

THE NEED FOR MORE RESPONSIBLE REGULATORY AND ENFORCEMENT POLICIES AT THE EEOC

HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

COMMITTEE ON EDUCATION
AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

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**THE NEED FOR MORE RESPONSIBLE
REGULATORY AND ENFORCEMENT
POLICIES AT THE EEOC**

**Tuesday, May 23, 2017
House of Representatives
Committee on Education and the Workforce
Subcommittee on Workforce Protections
Washington, D.C.**

The subcommittee met, pursuant to call, at 10:00 a.m., in Room 2175, Rayburn House Office Building. Hon. Bradley Byrne [chairman of the subcommittee] presiding.

Present: Representatives Byrne, Wilson, Hunter, Brat, Grothman, Stefanik, Rooney, Ferguson, Takano, Grijalva, Adams, DeSaulnier, Norcross, Krishnamoorthi, and Shea-Porter.

Also Present: Representatives Foxx, and Scott(VA).

Staff Present: Bethany Aronhalt, Press Secretary; Andrew Banducci, Workforce Policy Counsel; Ed Gilroy, Director of Workforce Policy; Jessica Goodman, Legislative Assistant; Callie Harman, Legislative Assistant; Nancy Locke, Chief Clerk; John Martin, Professional Staff Member; Dominique McKay, Deputy Press Secretary; James Mullen, Director of Information Technology; Krisann Pearce, General Counsel; Lauren Reddington, Deputy Press Secretary; Molly McLaughlin Salmi, Deputy Director of Workforce Policy; Alissa Strawcutter, Deputy Clerk; Olivia Voslow, Staff Assistant; Joseph Wheeler, Professional Staff Member; Tylease Alli, Minority Clerk/Intern and Fellow Coordinator; Kyle deCant, Labor Policy Counsel; Michael DeMale, Labor Detailee; Christine Godinez, Minority Staff Assistant; Eunice Ikene, Minority Labor Policy Advisor; Stephanie Lalle, Minority Press Assistant; Véronique Pluiose, Minority General Counsel; and Elizabeth Watson, Minority Director of Labor Policy.

Chairman BYRNE. A quorum being present, the subcommittee will come to order. Good morning. I would like to begin by welcoming our witnesses. Today's hearing is part of our continued oversight of the Equal Employment Opportunity Commission, and your testimony will help shape our ongoing effort.

Every American deserves an equal chance to earn success. No one should be denied an opportunity because of unlawful discrimination. The vast majority of employers treat their employees equally and foster an environment free of discrimination, but we live in

a world where prejudice and bigotry still exist, and bad actors must be held accountable.

That is why there are important protections under federal law to prevent workplace discrimination, including the *Civil Rights Act*, the *Americans with Disabilities Act*, the *Equal Pay Act*, and many others.

Republicans and Democrats agree our nation's non-discrimination laws must be properly enforced, and the EEOC should play a critical role in doing just that.

We would not be doing our job here in Congress if we did not hold the EEOC accountable when it has fallen short of its important responsibilities. That is why under the Obama administration we repeatedly raised concerns over the agency's misplaced priorities. The EEOC consistently took its eye off the ball and pursued flawed enforcement policies at the expense of American workers.

Take, for example, the agency's backlog of unsettled charges. At the end of 2016, the EEOC had more than 73,000 unresolved cases. Thousands of individuals were still waiting for answers on the discrimination charges they filed. This is completely unacceptable. These are men and women who turned to the federal government for help and got lost in an inefficient bureaucracy.

The EEOC's backlog has not always been this high. In fact, the average annual number of unresolved cases was roughly 90 percent higher under the Obama administration than the Bush administration. Ninety percent. And that's not all. The Obama EEOC pursued 50 percent fewer cases on behalf of individual workers.

If you get down to what the EEOC is really supposed to do, they are supposed to pursue the cases that are filed by individual workers, yet they filed 50 percent fewer. With this type of track record, one may wonder what exactly the EEOC has been doing all these years.

Part of the answer lies in the agency's misguided focus on phishing expeditions. Instead of using its resources to address actual claims of alleged wrongdoing, the EEOC has been on a nationwide search for "systemic" cases of discrimination that may or may not exist.

The result? A long list of frivolous lawsuits and the needs of many individual workers unmet. One U.S. District Judge described the agency's backward strategy as "sue first, ask questions later." And unanimous rebukes by the Supreme Court led the Wall Street Journal Editorial Board to name the EEOC the "government's most abusive agency."

However, the EEOC has been busy in more ways than just phishing expeditions. The agency has also spent its time and resources concocting overreaching and convoluted regulatory schemes. Most recently, we have seen expansive changes to the Employer Information Report, the EEO-1.

Under Federal law, employers have long been required to file employment data categorized by race, gender, ethnicity, and job category. This year, employers will fill out a form with 128 data points. Beginning next year, employers, including many small employers, will face a form with a whopping 3,360 data cells—128 now, 3,360 next year. That is 26 times the amount of information employers currently provide to the Federal Government.

Can you imagine making sense of this massive, confusing reporting regime as a small business owner? This new mandate is estimated to cost American job creators \$1.3 billion and more than 8 million hours of paperwork each year, resources that could go toward raising wages and hiring new workers.

And for what? We do not even know how the EEOC intends to use all of this new data and whether or not it can help combat pay discrimination in the first place. There are also serious privacy concerns since the agency has failed to demonstrate how it plans to safeguard this enormous amount of new information.

What the EEOC should be focused on is improving enforcement of existing worker protections, and that is exactly why we are here today, to hold the agency accountable and demand better. With a new Congress and a new administration, we have an opportunity to move the EEOC in a new direction, and that is precisely what America's workers need.

Today's discussion is an important step in our efforts to encourage the EEOC to adopt more responsible regulatory and enforcement policies. It is my hope we can have a thoughtful dialogue on how we can ensure the strong worker protections that exist in the law are properly enforced.

I will now turn to the ranking member, Mr. Takano, for his opening remarks.

[The statement of Chairman Byrne follows:]

Prepared Statement of Hon. Bradley Byrne, Chairman, Subcommittee on Workforce Protections

Every American deserves an equal chance to earn success. No one should be denied an opportunity because of unlawful discrimination. The vast majority of employers treat their employees equally and foster an environment free of discrimination. But we live in a world where prejudice and bigotry still exist, and bad actors must be held accountable.

That is why there are important protections under federal law to prevent workplace discrimination, including the Civil Rights Act, the Americans with Disabilities Act, and the Equal Pay Act, among others. Republicans and Democrats agree our nation's nondiscrimination laws must be properly enforced, and the EEOC should play a critical role in doing just that.

We wouldn't be doing our job here in Congress if we didn't hold the EEOC accountable when it has fallen short of its important responsibilities. That is why, under the Obama administration, we repeatedly raised concerns over the agency's misplaced priorities. The EEOC consistently took its eye off the ball and pursued flawed enforcement policies at the expense of workers.

Take for example the agency's backlog of unsettled charges. At the end of 2016, the EEOC had more than 73,000 unresolved cases. Thousands of individuals were still waiting for answers on the discrimination charges they filed. This is completely unacceptable. These are men and women who turned to the federal government for help and got lost in an inefficient bureaucracy.

The EEOC's backlog hasn't always been this high. In fact, the average annual number of unresolved cases was roughly 90 percent higher under the Obama administration than the Bush administration. 90 percent. And that's not all. The Obama EEOC pursued 50 percent fewer cases on behalf of individual workers.

With this type of track record, one may wonder what exactly the EEOC has been doing all these years. Part of the answer lies in the agency's misguided focus on fishing expeditions. Instead of using its resources to address actual claims of alleged wrongdoing, the EEOC has been on a nationwide search for "systemic" cases of discrimination that may or may not exist.

The result? A long list of frivolous lawsuits and the needs of many individual workers unmet. One U.S. District Court judge described the agency's backwards strategy as "sue first, ask questions later." And unanimous rebukes by the Supreme Court led the Wall Street Journal editorial board to name the EEOC the "government's most abusive agency."

However, the EEOC has been busy in more ways than fishing expeditions. The agency has also spent its time and resources concocting overreaching and convoluted regulatory schemes. Most recently, we've seen expansive changes to the employer information report, the EEO-1.

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This new mandate is estimated to cost American job creators \$1.3 billion and more than 8 million hours of paperwork each year—resources that could go toward raising wages and hiring new workers. And for what? We don't even know how the EEOC intends to use all of this new data and whether or not it can help combat pay discrimination in the first place. There are also serious privacy concerns since the agency has failed to demonstrate how it plans to safeguard this enormous amount of new information.

What the EEOC should be focused on is improving enforcement of existing worker protections. And that's exactly why we are here today: to hold the agency accountable and demand better. With a new Congress and new administration, we have an opportunity to move the EEOC in a new direction, and that's precisely what America's workers need.

Today's discussion is an important step in our efforts to encourage the EEOC to adopt more responsible regulatory and enforcement policies. It is my hope we can have a thoughtful dialogue on how we can ensure the strong worker protections that exist in the law are properly enforced.

Mr. TAKANO. Thank you, Mr. Chairman. It has been more than 55 years since the enactment of the *Civil Rights Act of 1964*, and the creation of the EEOC. In that time, the EEOC has been on the forefront of fighting discrimination in the workplace for all people, and its work is needed now more than ever. Race, gender, disability, and age discrimination still persist today.

In fiscal year 2016, the EEOC received a record total of 91,503 charges—35 percent were based on race, 29 percent were based on sex, 29 percent were based on disability status, and 22.8 percent were based on age discrimination. This evidence demonstrates that there is still a need for robust civil rights protections in the workplace.

We are here today to discuss the EEOC's regulatory and enforcement policies. If past is prologue, I am sure we will hear from witnesses and my colleagues on the other side of the aisle claiming that EEOC has overstepped its bounds in pursuing an aggressive litigation strategy and in its enforcement guidance. I do not believe this is the case.

With a more diverse workforce, the EEOC's charge is more difficult than ever before, and Congress should empower the EEOC to ensure that all people feel welcome in their workplaces.

There is really so much more work to do at the EEOC. Take, for example, the issue of pay discrimination. We are in the 21st century. *The Equal Pay Act* was passed in 1963, and the *Lilly Ledbetter Act* in 2009.

Why is the wage gap still an issue for millions of working women in our nation? On average, women make \$0.83 for every \$1.00 that a typical white man makes, and Census data shows that for women of color, the wage gap is even worse. On average, black women earn \$0.65 up to the \$1.00, Hispanic women earn \$0.59, and some AAPI women earn as little as \$0.44.

That is why I support the recent update to the EEO-1 Pay Data Collection Form.

If we do not have accurate data, we will not be able to solve this persistent problem. While the updated EEO-1 form will not eliminate pay discrimination on its own, it is an important step. The data from this form will help the EEOC assess where discrimination is and tell the Commission work to put an end to it.

The work of the EEOC ensures that there is fundamental fairness in the workplace. This is what the Commission sought to do with its 2012 arrest and conviction guidance. By clarifying when and how an employer can use arrest and conviction records, the EEOC was simply providing guidance to employers to ensure they were being fair in hiring and employment decisions.

This was not a mandate to tell employers they cannot use background checks but rather an effort to ensure fairness to all workers. In fact, the fundamentals of that enforcement guidance came from the pivotal case of *Griggs vs. Duke*, and previous EEOC memos. Over 150 cities and counties in 26 states already have adopted what is widely known as “ban the box laws.”

Mr. Chair, I hope our discussion today can center around the continued work the EEOC needs to do to end discrimination in the workplace. Thank you, and I yield back.

[The statement of Mr. Takano follows:]

Prepared Statement of Hon. Mark Takano, Ranking Member, Subcommittee on Workforce Protections

Thank you, Mr. Chairman.

It's been more than fifty-years since the enactment of the Civil Rights Act of 1965 and the creation of the EEOC. In that time, the EEOC has been on the forefront of fighting discrimination in the workplace for all people, and its work is needed now more than ever.

Race, gender, disability, and age discrimination still persist today. In Fiscal Year 2016, the EEOC received a record total of 91,503 charges: 35% were based on race, 29% were based on sex, 29% were based on disability status, and 22.8% were based on age discrimination. This evidence demonstrates that there is still a need for robust civil rights protections in the workplace.

We are here today to discuss the EEOC's regulatory and enforcement policies. If past is prologue, then I'm sure we will hear from witnesses and my colleagues on the other side of the aisle claiming that the EEOC has overstepped its bounds in pursuing an “aggressive litigation strategy” and in its enforcement guidance. I do not believe this is the case. With a more diverse workforce the EEOC's charge is more difficult than ever before and Congress should empower the EEOC to ensure that all people feel welcome in their workplace.

There is so much more work the EEOC needs to do.

Take for example the issue of pay discrimination. We are in the 21st Century. The Equal Pay Act was passed in 1963 and the Lilly Ledbetter Act in 2009. Why is the wage gap still an issue for millions of working women in our nation?

On average, working women make 83 cents for every dollar that a typical white man makes. And census data shows that for women of color the wage gap is even worse: on average black women earn 65 cents to the dollar, Hispanic women earn 59 cents, and some AAPI women earn as little as 44 cents. That is why I support the recent update to the EEO-1 pay data collection form.

If we don't have accurate data, we won't be able to solve this persistent problem. While the updated EEO-1 form won't eliminate pay discrimination on its own, it's an important step. The data that this form will now collect will help the EEOC assess where discrimination is and help the Commission work to put an end to it.

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Mr. Chair, I hope that our discussion today can center around the continued work the EEOC needs to do to end discrimination in the workplace.

Chairman BYRNE. Thank you, Mr. Takano. Pursuant to Committee Rule 7(c), all subcommittee members will be permitted to submit written statements to be included in the permanent hearing record. Without objection, the hearing record will remain open for 14 days to allow statements, questions for the record, and other extraneous material referenced during the hearing to be submitted in the official hearing record.

It is now my pleasure to introduce today's witnesses. Ms. Lisa Ponder is the Vice President and Global Human Resources Director for MWH Constructors, Inc., the construction arm of Stantec. She is testifying on behalf of the Society for Human Resource Management.

Ms. Rae Vann serves as the Vice President and General Counsel for the Equal Employment Advisory Council.

Mr. Todd Cox is Director of Policy at the NAACP Legal Defense and Educational Fund, Inc.

Ms. Camille Olson is a partner at Seyfarth Shaw LLP, and is testifying on behalf of the U.S. Chamber of Commerce.

I will now ask our witnesses to raise your right hand.

[Witnesses sworn.]

Chairman BYRNE. Let the record reflect the witnesses responded in the affirmative.

Before I recognize you to provide your testimony, let me just briefly explain our lighting system. You will each have five minutes to present your testimony. When you begin, the light in front of you will turn green. When one minute is left, the light will turn yellow. When your time has expired, the light will turn red. At that point, I will ask you to wrap up your remarks as best you are able. After you have testified, members will each have five minutes to ask questions.

Now, some of you have practiced law. You have been in the courtroom where the judge brings down the hammer at exactly the time. I am not that kind of chairman, but we do want to try to keep our remarks within the time frame because that will allow us to have the maximum time here to do it, so if I start pushing you a little bit, it is not to be overly rigorous in running the meeting, I am just trying to keep us on track. Is that fair enough? Thank you. All right.

I would like to begin to recognize our witnesses, and we will start with you, Ms. Ponder.

TESTIMONY OF LISA PONDER, VICE PRESIDENT AND GLOBAL HR DIRECTOR, MWH CONSTRUCTORS, INC., BROOMFIELD, CO, ON BEHALF OF THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT

Ms. PONDER. Good morning, Chairman Byrne, Ranking Member Takano, and members of the committee. It's an honor to be here with you to discuss the need for responsible regulations and enforcement at the EEOC, and in particular, the EEO-1 Report.

I serve as Vice President and Global HR Director for MWH Constructors, Inc., or MWH, the construction arm of Stantec, a global engineering and construction company, and I appear before you today on behalf of the Society for Human Resource Management or SHRM.

SHRM believes the EEOC plays a critical role in ensuring that employees have equal opportunity to work in environments that are free from discrimination. Just as importantly, the EEOC educates employers to help prevent illegal discrimination and addresses it whenever found. SHRM strongly supports these goals.

Mr. Chairman, regulations need to be developed and implemented to meet the policy goals of the underlying statutes. As it relates to today's hearing, SHRM is concerned that the revised EEO-1 Report will not prove useful in achieving the objective of curtailing compensation discrimination, while at the same time being administratively burdensome and costly.

Let me illustrate a few of these concerns. The EEOC revision to collect compensation data at the level of the EEO-1 job category is unlikely to uncover discriminatory pay practices because the category includes a wide range of jobs while not factoring in legitimate non-discriminatory pay rates.

For example, in 2016, MWH reported 1,100 engineers under the professional category, 307 women, 793 men. However, these engineers' experience ranged from just out of college to more than 20 years. Understandably, we pay our engineers with 20 to 30 years of experience more than we pay our millennial engineers with one to five years of experience.

Couple this with the reality that women representing the Baby Boomer generation in our industry only account for approximately 5 percent of our engineers, whereas female millennial engineers represent nearly 20 percent of the industry.

Reporting both men and women in one job category will produce a result showing that we pay our male professionals more than we pay our female professionals.

The revised report doesn't allow us to report individual experience, so the report will appear to have a pay differential based on gender rather than experience, a non-discriminatory factor.

Another area of concern of the revised EEO-1 is the collection of W-2 gross income. As the EEOC recognizes, W-2 gross income includes non-discriminatory variables that may impact earnings, including shift differentials, bonuses, commissions, and overtime compensation.

While this data may provide the EEOC with a broader view of pay practices, collecting this data will not allow the EEOC to evaluate comparative compensation data points.

The above concerns coupled with those outlined in my written statement raise serious doubts regarding whether the stated purpose of addressing pay differential can be accomplished from the revised EEO-1 data collection effort.

Now, I want to take a few moments to discuss ways to improve the investigative process at the EEOC. In areas where it's appropriate, I would recommend the Commission rely more on mediation and non-binding settlement conferences with the investigator as arbiter.

When given this opportunity, MWH always participates and tries to reach a resolution of the complaint in a fair and timely manner. Used properly, mediation and settlement processes can provide fair, equitable, and timely settlement to the employer and the employee, and can save time and resources for all involved.

The investigative process could be improved with better focus on what the EEOC can and should be doing with the resources it has. Overburdened EEOC staff with a large caseload slows the process almost to a halt, with neither the employee or the employer community served well.

The EEOC needs to find a way to better prioritize cases as experienced investigators can ask the right questions, quickly leading them to make appropriate and educated decisions on the merit of the claims right from the start.

In closing, Mr. Chairman, SHRM will continue to work with the EEOC to institute effective non-discriminatory practices that address the 21st century workplace. In so doing, SHRM encourages the Commission to reevaluate its investigative process to help reduce the backlog of outstanding complaints. A fair and expeditious process provides finality for both the employee and the employer.

However, for the reasons I've stated, SHRM is concerned that the revised EEO-1 Report will not prove useful in achieving the stated objective of curtailing unlawful compensation discrimination.

Thank you for this opportunity, and I'm happy to answer questions.

[The statement of Ms. Ponder follows:]



Statement of Lisa Ponder, J.D., SHRM-SCP
Vice President and Global HR Director
MWH Constructors, Inc.
Broomfield, Colorado

On Behalf of the
Society for Human Resource Management

Submitted to the
U.S. House Committee on Education and the Workforce,
Subcommittee on Workforce Protections

Hearing on
The Need for More Responsible Regulatory and Enforcement
Policies at the EEOC
Tuesday, May 23, 2017

Introduction

Chairman Byrne, Ranking Member Takano, I am Lisa Ponder, Vice President and Global Human Resources Director for MWH Constructors, Inc. (MWHC). MWHC is the construction arm of Stantec, a global engineering and construction company with over 23,000 employees. MWHC has 2,100 employees with 900 in the United States working in 17 states. Thank you for the opportunity to testify before the Committee on the need for responsible regulatory and enforcement policies at the U.S. Equal Employment Opportunity Commission (EEOC) and the revision to the EEO-1 Report to collect pay data, as well as the investigative process at the EEOC.

At MWHC, I develop compensation plans for more than 2,000 employees as well as design and lead our human resource (HR) strategies that help attract and retain the best talent for our company. In my more than 20 years' experience as an employment law attorney working in the field of HR, I have developed a keen understanding of compliance and employee relations. My legal and HR career includes experience with recruiting, developing compensation and benefits plans, and employee development as well as leading payroll.

I appear before you today on behalf of the Society for Human Resource Management (SHRM), where I have been a member for 12 years and currently serve as a member of SHRM's Advocacy Team. SHRM is the world's largest HR professional society, and for nearly seven decades the Society has been the leading provider of resources serving the needs of HR professionals and advancing the practice of human resource management. SHRM represents 285,000 members who are affiliated with more than 575 chapters in the United States and subsidiary offices in China, India and United Arab Emirates.

The Equal Employment Opportunity Commission ("EEOC" or "Commission") plays a critical role in ensuring that employees have equal opportunity to work in environments that are free from discrimination. Just as importantly, the Commission educates employers to help ensure they take effective action to prevent discrimination and address it appropriately whenever found. SHRM strongly supports the goals of the EEOC and has a long-standing partnership with the agency in its efforts to inform and educate the employer community on these important issues.

Further, SHRM strongly supports nondiscrimination in all aspects of employment and believes compensation decisions should be based on an individual's qualifications and ability to perform a job, not on characteristics that have no bearing on job performance. To assist HR professionals, SHRM provides a variety of educational resources for its members on issues related to nondiscrimination in the workplace, including compensation. Nearly all SHRM conferences address these topics in addition to resources like articles, toolkits, and webinars available on the SHRM website.

In my testimony, I will address the limitations of the information sought by the Commission in its revised EEO-1 report and the challenges HR will face collecting and reporting the compensation data. In addition, I will discuss EEOC's investigative process and proposed reforms that would meet the needs of the 21st Century work environment.

The Role of Compensation in an Organization's Talent Management Strategy

One of the key focuses for HR overall is managing talent to create a world-class work environment. One aspect of talent management includes creating an effective total rewards strategy to recruit and retain employees that is made up of compensation, benefits, personal growth opportunities and increasingly workplace flexibility options. I'd like to spend a few minutes describing how organizations approach the development of a total rewards strategy because I think it helps provide context for understanding the role compensation plays in the workplace.

In developing a total rewards strategy, HR seeks to provide the employer with an approach for compensating employees that is compatible with the organization's mission, strategy and culture. The strategy must be appropriate for the specific workforce and it needs to be internally and externally equitable.

The degree of market competition, the level of product demand and industry characteristics all have an influence on compensation and benefits philosophy. To effectively recruit new employees and retain existing ones, an organization must have internal equity, where employees feel that performance or job differences result in corresponding differences in rewards that are fair. Organizations also must ensure external equity where an organization's compensation levels and benefits are competitive with organizations in the same labor market that compete for the same employees. An organization is likely to use a combination of strategies in approaching pay. For example, for critical jobs and competencies, the organization may decide to lead the competition in compensation, whereas in other areas, the organization may match what its competitors are paying their employees in the local market or industry.

Once an organization has defined its compensation philosophy, HR creates a pay system which consists of grouping jobs into pay grades and creating a pay range that sets the upper and lower limits of compensation in each grade based on experience, skills and competencies. The midpoint is often considered the market rate paid to an experienced employee meeting performance expectations.

A well-designed pay system not only helps attract new employees but also plays an important role in motivating and retaining current employees. Additionally, an effective compensation system will include specific pay practices to help an organization achieve its goals. For example, merit pay or pay for performance ties subsequent wage increases to performance and the degree to which job mastery is attained. Other pay practices may include productivity-based pay determined by the employee's output, such as a piece-rate system, as well as person-based pay, which ties pay to desired employee characteristics such as knowledge, including certifications and other education credentials; skills; and competencies that an individual employee may possess, such as experience directing or training others.

Of course, a variety of pay practices also affect take-home pay: cost-of-living adjustments; general pay increases based on local competitive markets; seniority increases; lump-sum and performance bonuses; as well as differential pay based on the type of work. Differential pay includes additional pay for less desirable shifts; emergency shifts; premium pay for working

holidays or extra hours; hazard pay; on-call pay; reporting pay; travel pay; and overtime pay. Geographic differential pay includes accommodating cost-of-living in different locations; attracting workers to certain locations; or foreign pay. Incentive pay for meeting organizational goals in productivity or sales is also common.

As you can see, employers design their pay structures to reflect the business goals the organization is trying to achieve, while addressing the need to attract qualified applicants and retain qualified employees who are motivated by the opportunity and rewards offered by that employer.

To remain effective, pay structures must be re-evaluated over time to ensure the ranges remain both internally equitable and externally competitive. In fact, an essential part of maintaining equity and fairness in the workplace is regular evaluation of the organization's total rewards strategy—including pay, benefits, performance, professional development and other career opportunities. It is also important that employers share their compensation philosophy throughout the organization and are transparent about their compensation practices.

Even with all the legal and HR expertise that goes into creating equitable pay structures, the gender pay gap between men and women persists. There have been numerous studies analyzing the pay differential, yet disagreements exist as to the size of the gap. Furthermore, a complete explanation of the reasons for the pay gap remains elusive. Some of the most recent work in determining the factors that influence pay differences between men and women point to more nuanced factors. Claudia Goldin, in her research, describes the cost of “temporal flexibility” and Anne-Marie Slaughter similarly refers to the “motherhood” or “care” penalty that leads many women to pursue jobs that prioritize flexibility over salary. One powerful way to decrease that gap, it is argued, is to increase the availability of workplace flexibility. SHRM has championed the creation of flexible workplaces to benefit all employees – men and women alike – by providing training materials to help enhance flexibility in all types of workplaces and by honoring employers that are achieving results in this area through our *When Work Works* Award.

One important factor in an employee's wage differential is that employee's own chosen career path – previous jobs, departments, experience, education, and geographic locations all affect pay. Similarly, levels of responsibility, such as the number and type of direct reports, oversight responsibilities for budgets or customer accounts, and performance history affect individual compensation.

From the HR perspective, these differences in knowledge, skill, ability, proficiency, responsibility, and geographic location, provide a legitimate basis for differences in pay among employees doing similar work. The key, however, is figuring out what is causing the wage differential and what amount of it is due to discrimination. Unfortunately, the data the EEOC wants to collect from employers does not help identify those employers with illegal and discriminatory practices.

Collecting Data by EEO-1 Category

The EEOC's revision to collect compensation data at the level of EEO-1 job category is unlikely to shed much light on whether an employer's pay practices are discriminatory. This is because each EEO-1 job category includes a wide range of jobs, for which vastly different rates of pay are paid based on a variety of legitimate, nondiscriminatory factors. In MWHC's case for example, our company reports all our project engineers in one job category on the report – "professionals." MWHC reported 1,100 employees in that category for 2016 – 307 women and 793 men. The vast majority of these professionals are some type of engineer. However, these engineers range in levels of experience from just out of college to more than 20 years of experience. Many of these engineers will grow in expertise and knowledge, and will remain individual contributors. This fact will prevent them from moving into the First/Mid-Level Officials and Managers Job Categories.

MWHC reports all its engineers in the professional category in the EEO-1 report. Our engineering group includes young people right out of college all the way up to senior engineers with over thirty years of experience. We pay our more senior engineers with 20-30 years of industry experience more than we pay our millennial engineers just out of school with 1-5 years of experience. The number of women engineers in the baby boomer generation is approximately 5 percent in our industry, so we have very few senior women engineers. However, the number of women engineers in the millennial generation is closer to 20 percent in our industry, so we have many more junior women engineers. Reporting both groups in one job category as required under the new EEO-1 Report will produce a result showing that we pay our male professionals more than our female professionals. There is no way to show that in reality we pay our senior engineers more than we pay those with much less experience. There will appear to be a pay differential based on gender when in fact the pay differential is based on years of experience.

Looking at only the data reported by the EEO-1 Report, our company will appear to be discriminating against women engineers – it will show a pay differential where none exists. There is no way to show the experience or responsibility levels that dictate an individual's compensation in the EEO-1 report. Not having the ability to counter the imbalance of the male-to-female ratio in the engineering field leads to a false narrative that could discourage women from pursuing a career in the science, technology, engineering and math fields.

As a multistate employer, the EEO-1 Report compounds this problem for our company because we are required to provide this data for all establishments that have more than 50 employees. MWHC has various offices and project sites that are divided by role – corporate or project. At our corporate offices, we have a good balance of gender diversity. Whereas at some of our construction project sites, we only have pure field construction positions that are predominately male. Therefore, our report by establishment shows a misrepresentation of our total workforce. Again, this is a false narrative portrayed by the EEO-1 Report.

Collecting Aggregated W-2 Gross Income in the Revised EEO-1 Report

In the EEO-1 Report revision, the collection of W-2 gross income information is misplaced for its stated purpose. As the agency recognizes, W-2 gross income includes other non-

discriminatory variables that may impact earnings, including shift differentials, bonuses, commissions, and overtime compensation. Thus, while this data may provide the agency a broader view of pay practices, collecting this data will not allow the EEOC to evaluate comparable compensation data points.

For example, two engineers at MWHC could have different W-2 gross wages if one was excused from working overtime hours as a reasonable accommodation under the Americans with Disabilities Act (ADA), while the other not only worked continuously throughout the year but also worked all overtime hours offered to her. Providing hours worked by both employees does not adequately account for the differences in pay because there is no way to account for the fact that some of the hours of one employee were paid at a premium rate, while the other employee asked to be excused from all overtime hours for a legitimate, nondiscriminatory reason.

Likewise, two employees with the same job title may have different W-2 gross wage information in a calendar year if one of the employees receives a \$25,000 signing bonus that year and the other does not. This is the case even if the other employee received the same \$25,000 signing bonus when he or she began employment in a different EEO-1 reporting year. If the two employees are of different races or genders, aggregating the W-2 wage information of these two employees will make it appear as if there is a potential pay discrimination issue. Again, reporting total hours worked for these two employees would not account for the legitimate, nondiscriminatory reason for the difference in pay.

Collecting Total Hours Worked

The EEOC's revision would require that employers report actual hours worked by employees based on race/ethnicity and gender in each EEO-1 job category. Most SHRM members do not collect data of actual hours worked for employees that are classified as exempt from overtime under the Fair Labor Standards Act. As the Committee knows, exempt employees are compensated for their performance and for accomplishing organizational goals, not for hours worked on the job. The burden associated with collecting actual hours worked for exempt employees, and the impact this would have on other compliance obligations as well as overall company culture, should not be underestimated.

Under the revision, employers that do not collect data of actual hours worked would be expected to use a default hours worked – estimate of 40 hours per week for all full-time exempt employees. However, not all employers adopt a 40-hour workweek; the “standard” workweek for some employers may be 35 or 37.5 hours. In addition, in some local jurisdictions, the maximum workweek for some professions is established by law at a number below 40 hours per workweek. These differences in the standard workweek across employers are not captured in the revision, even though such differences might have a direct impact on how one employer's summary pay data compares to another employer's summary pay data.

Regardless of whether an employer's “standard” workweek is 40 hours, 37.5 hours or 35 hours, many exempt employees regularly work hours that vary from their employer's standard workweek. In these circumstances, using a single default hours worked figure for all exempt employees will lead to anomalous results when looking at pay data in the broad EEO-1 job

categories. For example, adopting the assumption that all exempt employees categorized as professionals work 2,080 hours each year (40 hours/week) does not accurately reflect that one professional, such as a doctor or a lawyer who is female may be more highly compensated precisely because she is expected to be available to handle work matters that arise outside of normal business hours, thus requiring that she work more than 2,080 hours in a year. Yet, the salary of this employee would be averaged with the salary of a lower earning male professional accountant who is paid less in part because he generally does not work outside normal business hours, without any way of accounting for the increased number of hours worked by the exempt female employee.

Reporting total actual hours worked without providing additional information also fails to account for the personal choices some employees make. For example, if two non-exempt employees are both offered the same amount of voluntary overtime, but only one agrees to work the additional hours, how will the agency view this data when it is reported in the employer's annual filing? Under the agency's revision, the pay and hours worked for one employee will be higher than the other, but there will be no way for the employer to indicate that the difference in pay was due to employee choice, rather than any decision by the employer. While the EEOC's revision suggests that collecting this type of data will allow the government to evaluate whether there are barriers to equal opportunity for earning other types of compensation beyond base salary, this example aptly illustrates why drawing any conclusions from this type of data would be flawed.

Given the above limitations associated with collecting total hours worked for exempt employees, SHRM is concerned that any data reported would not be a reliable approximation of the number of actual hours worked. This certain ambiguity raises serious doubt regarding whether the stated purpose of addressing the pay differential can be accomplished from the information collected.

Concerns About Confidentiality

SHRM and its members are very concerned about the confidentiality of the compensation data the EEOC intends to collect. The EEOC's revision would gather very specific compensation information by establishments, including very small establishments, using a web-based format. For many small employers, and even larger employers with small establishments such as MWHC, reporting data in this manner will result in the reporting of individual, employee-level data. Our concerns are not just focused on protecting our companies, but also on protecting our employees, many of whom would not be happy if their personal pay information was widely disclosed because of a data breach of the EEO-1 reporting system.

Furthermore, large employers like MWHC currently e-mail their EEO-1 Reports to the EEOC for batch uploading. It goes without saying that this is obviously not a secure way to transmit large amounts of confidential salary and competitive information, yet the EEOC's revision makes no mention of how the agency plans to revise its own protocols to ensure that employers can safely report their compensation information to the government. In its comments to the EEOC in April 2016, SHRM recommended that the Commission should not move forward with

the implementation of any compensation data collection tool until appropriate data security safeguards are developed, tested and perfected to ensure protection of employees' pay data¹.

Suggested Improvements to the EEOC Complaint Process

Over the course of my career in HR, I have had experience with the EEOC complaints process and see opportunities for improvement in case processing from the employer perspective. In my experience, once the employer has responded to the complaint, the undetermined review period begins. Most of the time, MWHC did not hear anything back from the EEOC for months despite the statute's requirement that the Commission complete its investigation within 180 days. The delay in processing cases hurts both the employee and the employer. The employee, if the case is meritorious, may have a hard time pursuing it after so much time has passed. Employers also value finality and knowing that they are not facing continued exposure on a complaint. In the last 10 years, many of our EEOC complaints have included an option to participate in a non-binding settlement conference with the investigator as the arbiter. If given this opportunity, MWHC always participates to try and reach a conclusion to the complaint in a fair and timely manner. Used properly, mediation and settlement processes can provide a fair, equitable and timely settlement to the employer and employee and can save time and resources for all involved – the employer, the employee and the Commission.

In my experience, the EEOC investigators want to do a good job and genuinely want to ensure people are not discriminated against. Unfortunately, they have too many cases to accomplish either of their endeavors. I have never had the EEOC find that the claim I have responded to had merit. About 50 percent of the claims I have responded to have been dismissed after the initial response. The other 50 percent, the EEOC found no reasonable cause to pursue action and the complaint was finally given back to the employee with a right-to-sue letter. In my experience, if a complaint does not have merit, it can sit on a pile of claims and wait for months or even years to move forward. However, if the claim deals with a "hot issue" like systemic gender discrimination, it moves at a reasonable or accelerated pace through the system.

The process could be improved with better focus on what the EEOC can and should be doing with the resources it has. Overburdening EEOC staff with a large caseload slows the process almost to a halt and with neither the employee or employer community served well. Employees with legitimate claims of discrimination can't wait to get their "right-to-sue" letters because there are private attorneys ready and willing to take on their cases. Those with weak claims are greatly impacting the overall process. The EEOC needs to find a way to better prioritize cases – an experienced investigator or attorney can ask the right questions quickly leaving them to make an appropriate and educated decision on the merit of the claim right from the start.

SHRM appreciates that the Commission has been struggling with this backlog for several years. SHRM encourages the EEOC to address reducing the backlog through directing its resources to encourage greater efforts at mediation and settlement and continuing to pursue a balance between individual discrimination claims and systemic claims. Proposals to require review of litigation by the commissioners themselves could help better balance the Commission's priorities.

¹ <https://www.regulations.gov/document?D=EEOC-2016-0002-0911>

Working with Employers

One area of positive actions with the EEOC is its efforts to inform, educate and gather input more frequently from the employer community. Similar to mediation, SHRM encourages additional educational and outreach efforts to the employer community to foster a working relationship between employers and the Commission which results in better employer practices. As a SHRM member, I have appreciated hearing from commissioners and EEOC staff speaking at SHRM conferences about the Commission's policy priorities and how the Commission is focusing its work. Having access to the Commission's multi-year strategic enforcement plans has helped put those areas of focus in the minds of employers.

SHRM and its members also appreciate the opportunity to provide input and expertise into the Commission's regulatory and educational activities as it considers issues affecting the workplace. Employers have appreciated the ability to provide written comment on proposed guidance that is not required to go through the formal rulemaking process. This guidance, as an interpretation of existing regulations and court cases, has a tremendous impact on employers' compliance, and as such, it is critical that employers and others affected by the guidance have the ability to review and provide insight and comment.

The goal of employers, along with the Commission, is to prevent discrimination before it happens. Employer education is key to that outcome. Many SHRM members and employers have benefitted from the EEOC's Training Institute, its seminars and courses. Proactive outreach to and education for employers, from both the Institute and certain regional offices, has been an important aspect of prevention.

The Commission's use of task forces also moves policy discussions in a positive direction. A good example of the EEOC reaching out to employers and other stakeholders was its recent Task Force on the Study of Harassment in the Workplace. This Task Force, which included SHRM members, as well as employment lawyers and employee representatives who had suffered harassment, carefully studied and considered the issue. This broad perspective resulted in a very helpful and useful report. Most significantly, the report included several checklists for HR and employers and a compilation of promising practices. Materials that are designed to assist, inspire and guide employers are critical to ensuring that organizations continue to innovate to create what we call a "world-class" work environment.

Employer Needs Regarding Regulation

When it comes to regulations, employers and HR value clarity and non-duplication. One recent major regulation promulgated by the Commission unfortunately missed this standard and is in need of additional modification to be consistent with federal law and other agency regulatory guidance.

In May of 2016, the EEOC issued final rules under the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act on employer-sponsored workplace wellness programs. Guidance and clarification was badly needed on workplace wellness programs and this provided an opportunity to align regulations under these statutes with the existing

requirements of the Affordable Care Act and the Health Insurance Portability and Accountability Act.

Unfortunately, the final EEOC regulations were not consistent with the existing rules which only discourages employers from adopting wellness programs, invites additional litigation and further increases compliance costs for these plans. Therefore, it would be advantageous if the EEOC would reexamine these rules to provide ultimate clarity on what is allowable for wellness plans under the Affordable Care Act.

Conclusion

Mr. Chairman, thank you again for convening this hearing to examine the need for responsible regulatory and enforcement priorities at the EEOC. SHRM looks forward to continuing to work with the EEOC to institute effective nondiscriminatory practices for the 21st century workplace and workforce.

SHRM would also encourage the EEOC to reevaluate its investigative process to help reduce the backlog of outstanding complaints while at the same time providing finality to those employers facing complaints. In the end, both the employee and the employer gain from a fair and expeditious process.

As I outlined in my testimony, SHRM remains concerned that the revised EEO-I Report will not prove useful in achieving the stated objective of curtailing unlawful compensation discrimination. Therefore, SHRM believes the recent changes to the EEO-I Report should be rescinded.

Finally, SHRM members continue to implement employer-sponsored wellness programs to improve the health and well-being of all employees, but EEOC guidance regarding these programs has created ambiguity for many employers as they incorporate financial incentives for participation in wellness initiatives. SHRM encourages Congress to advance H.R. 1313, the Preserving Employee Wellness Programs Act, which would provide much needed clarity to employers on the use of financial incentives within employer wellness programs.

Thank you for your time. I appreciate the opportunity to share my perspective with you today and would be happy to answer any questions.

Chairman BYRNE. Thank you, Ms. Ponder. Ms. Vann, you are recognized for five minutes.

TESTIMONY OF RAE T. VANN, VICE PRESIDENT AND GENERAL COUNSEL, EQUAL EMPLOYMENT ADVISORY COUNCIL, WASHINGTON, D.C.

Ms. VANN. Chairman Byrne, Ranking Member Takano, and members of the subcommittee, thank you for inviting me to testify today about the challenges and opportunities facing the EEOC in carrying out its important mission of preventing and eliminating workplace discrimination.

My remarks today will focus on three interrelated policy areas, and time permitting, on the revised EEO-1 Report.

The first item pertains to the evolution of the EEOC's systemic enforcement strategy and the difficulty it's posed for stakeholders.

For some time now, that strategy has emphasized developing facts sufficient to support class-based, attention grabbing litigation rather than on investigating and resolving charging parties' actual bias claims.

We have seen that play out in individual charge investigations where the investigator spends an inordinate time looking for possible indicators of broader discrimination than actually alleged in the underlying charge itself, and in a number of the cases the EEOC has prosecuted in court.

We feel this is due in part to a lack of adequate supervision. For instance, under the Commission's current delegation of litigation authority to the General Counsel, the regions decide in most instances without prior approval or input from the full Commission which cases should be litigated.

The lack of headquarters' oversight presents a problem in particular for large employers with locations throughout the country. They often face different standards from region to region, not only as to litigated matters, but also as to charge investigations and other pre-suit activities.

Related to general management oversight is the issue of quality assurance. While the EEOC has made a concerted effort recently to improve the quality of its investigations and conciliations, we are not sure the current quality standards have trickled down to the field as quickly or as evenly as necessary.

Respondents and charging parties want to and should have confidence that every charge investigation is held to the highest quality standards, but we just haven't seen enough consistency across the regions to be certain of that.

Establishing and implementing a meaningful quality control system for investigations and conciliations we believe is critical to achievement of the agency's statutory mission.

Also, relevant to effective civil rights enforcement is the ability to conduct charge investigations as promptly and as efficiently as possible, because months or sometimes years long investigations only serve to delay resolution of those bias claims, and the EEOC should be encouraged and provided with the necessary resources to improve the time it takes to conduct charge investigations and conclude its administrative proceedings.

In addition, the EEOC's current quality standards in our view are not sufficient to ensure its conciliation obligations are being met. As the Supreme Court outlined recently, proper conciliation involves providing the employer with all the necessary information it needs to understand the basis for the EEOC's findings, and to determine its own settlement position.

Basic information such as what practice has harmed which person.

The EEOC's quality standards should describe what meaningful conciliation looks like. It's especially important that those standards be reflected in the procedural regulations, which currently specify only that the agency attempt to achieve a just resolution of all violations found.

Finally, we believe that the EEOC should seriously consider expanding its very successful mediation program to more stages of the investigative process including conciliation.

Once reasonable cause is found, the dynamics of the situation change significantly, and an employer that may have been disinclined to go to mediation beforehand may now see some value in doing so.

The EEOC also could utilize mediation as a viable alternative to litigation in the event the conciliation is unsuccessful. At that stage, an outside neutral with no stake in the outcome may greatly assist the parties and the agency in reaching a mutually acceptable resolution that avoids the costs and time involved in Federal court litigation.

In my written comments, I discuss our concerns with the revised EEO-1 Report, which are consistent with Ms. Ponder's remarks. I'm happy to discuss those concerns if you wish during questions. Thank you again for the opportunity to testify.

[The statement of Ms. Vann follows:]

STATEMENT OF

RAE T. VANN
VICE PRESIDENT AND GENERAL COUNSEL,
EQUAL EMPLOYMENT ADVISORY COUNCIL

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON EDUCATION AND THE WORKFORCE
SUBCOMMITTEE ON WORKFORCE PROTECTIONS

MAY 23, 2017

Introduction

Chairman Byrne, Ranking Member Takano, and Members of the Subcommittee, thank you for inviting me to testify today regarding the challenges and potential opportunities facing the U.S. Equal Employment Opportunity Commission (EEOC) as it advances its mission to prevent and eliminate workplace discrimination. I appear here today as Vice President and General Counsel of the Equal Employment Advisory Council (EEAC).

EEAC is a nationwide association of employers whose mission since 1976 has been to promote sound approaches to promoting equal employment opportunity and compliance with nondiscrimination and other workplace rules. Its membership comprises over 250 major U.S. corporations, and its directors and officers include many of the nation's leading experts in human resources and equal employment opportunity compliance. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity, and thus fully support the EEOC's mission to investigate and correct discriminatory employment practices.

All of EEAC's members are employers subject to the laws enforced by the EEOC. As potential respondents to EEOC discrimination charges, EEAC member companies have a strong interest in ensuring that the agency's enforcement priorities are consistent with its statutory authority and are pursued in a fair, competent, and effective manner. To that end, EEAC regularly has testified before, and provided written comments to, the EEOC on a range of regulatory, policy, and administrative matters. These include, but are not limited to, the agency's development and implementation of its pivotal National Enforcement Plan (NEP) and Priority Charge Handling Procedures (PCHP); the efficacy of EEOC mediation; reorganization of agency operations; development and implementation of its Strategic Enforcement Plan (SEP); and the burdens and utility of various proposed and implemented data collection tools, including the EEO-1 report.

Recent Emphasis on Systemic Enforcement Has Detracted from EEOC's Core Mission

The EEOC's core mission is, and always has been, to prevent and correct discriminatory employment practices. It does so by conducting proper charge investigations and by attempting to correct alleged violations through informal means of "conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b). Although the EEOC has many meaningful tools at its disposal to effectively investigate and resolve workplace discrimination – including a dedicated and hard-working staff of enforcement and policy professionals – regrettably the agency has fallen short of the mark in a few critical areas.

In particular, we believe that the EEOC's past commitment to redressing workplace discrimination through meaningful technical assistance and stakeholder education, top-notch customer service, and quality charge investigation and conciliation has been severely undermined by its strong emphasis in recent years on developing and prosecuting class-based, systemic litigation. In addition, while we appreciate that the EEOC is statutorily authorized to commence litigation where warranted and in the public interest, EEOC member companies are deeply concerned with ensuring that such litigation, when it does occur, is prosecuted competently, responsibly, and fairly.

Moreover, although the EEOC may litigate strategically in the public interest, voluntary resolution of discrimination claims remains "the preferred means for achieving the goal of equality of employment opportunities." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 368 (1977) (internal quotation omitted). As described below, the agency's self-imposed pressure to "fish" for large, class-based claims has undermined the quality and effectiveness of its overall enforcement efforts and has detracted from ensuring that litigation remains an option of last resort.

By way of background, in early 2005, the EEOC appointed an internal Systemic Discrimination Task Force and charged the group both with evaluating the effectiveness of the agency's existing systemic program and coming up with recommended changes. The result was a 65-page report which recommended a number of significant changes designed to improve the agency's systemic investigations and litigation efforts, including a much more strategic and coordinated approach to identifying and developing systemic cases. The report also called on the EEOC field staff to more aggressively develop systemic discrimination charges and lawsuits, noting that the EEOC field offices had been reluctant to pursue systemic discrimination in the past because of the significant time and resources those cases require.

The emphasis on systemic enforcement was further endorsed in the EEOC's 2013-2016 Strategic Plan and its accompanying Strategic Enforcement Plan (SEP).¹ The initial SEP for Fiscal Years 2012-2016 was approved in December 2012. The SEP for Fiscal Years 2017-2021 was finalized in October 2016. Under the SEP, the EEOC has continued to direct substantial staff time and resources to investigating and prosecuting alleged systemic discrimination claims. The agency's current Strategic Plan goes so far as to require its district offices to achieve numerical quotas as to the minimum number of systemic cases on their litigation dockets. *See* Strategic Plan for Fiscal Years 2012 through 2016 (as modified on February 2, 2015), PERFORMANCE MEASURE 4 ("By FY 2018, 22-24% of the cases on the agency's active litigation docket are systemic cases").²

Inherent in the EEOC's systemic enforcement strategy is the assumption that widespread workplace discrimination is present in every district and region – and at every company – across the country. Thus, even where no individual has brought such discrimination to the EEOC's attention by filing a charge, it seems the agency feels it must go out and find it by whatever means necessary. Indeed, the agency has been roundly criticized by stakeholders and the courts alike for focusing more on conducting "fishing expeditions" in search of unasserted violations than on addressing and resolving meritorious, asserted claims. We question whether this approach is an appropriate use of the EEOC's limited resources or, more fundamentally, is consistent with Congressional intent in enacting Title VII.

Rather than focusing on increasing its systemic litigation docket, the EEOC should do more on the front end to ensure that all discrimination charges it receives are properly categorized, investigated, and resolved. We believe that the key to accomplishing the EEOC's statutory mission lies in ensuring that it maximizes investigative resources to more effectively address and resolve the actual claims presented to it, rather than chasing down unasserted and/or hypothetical indicators of potential systemic discrimination. In other words, the EEOC should develop clear standards that can be applied at each stage of the process to determine, as described in the NEP, "whether the strength of the case and the nature of the issue supports the decision to proceed." Section II. F.

¹ The Strategic Plan stated that the SEP would replace the EEOC's 1996 National Enforcement Plan (NEP), the main objectives of which were to (1) reduce the substantial discrimination charge backlog that had built up to that point; (2) engage in more focused, strategic enforcement; and (3) better utilize mediation and education and outreach as a means of discrimination prevention.

² EEOC, FY 2016 Performance and Accountability Report 23, *available at* <https://www.eeoc.gov/eeoc/plan/upload/2016par.pdf>.

The EEOC's Priority Charge Handling Procedures (PCHP) system, for instance, contemplates that each filed charge undergoes a thorough and deliberate review at the intake stage of the administrative process. We suspect that does not occur with regularity.

If the EEOC focused more intently on its stated goal of ensuring consistent, nationwide application of the PCHP, it could expedite the resolution of the vast majority of workplace disputes and redirect its resources to other critical program areas, such as education and outreach, as well as mediation, professional staff development, and quality assurance. On the other hand, failure to properly categorize charges can result in precious time wasted on investigating frivolous charges ("C" charges suitable for dismissal), as well as insufficient attention being paid to priority issues ("A" charges warranting prompt attention).

In addition, and further to that end, we urge the elimination of the above-referenced, Strategic Plan-mandated incentives tied to development of systemic investigations and litigation by field offices, which we believe have contributed to prolonged, costly investigations and frivolous court litigation. Requiring that specific systemic litigation goals be met further frustrates discrimination charge processing and informal resolution by incentivizing staff to forgo a proper investigation and find reasonable cause even in marginal cases. That in turn affects the quality of enforcement efforts as a whole, since effective *litigation* of discrimination claims (whether systemic or not) heavily depends on a thorough, complete, and proper *investigation* of the underlying discrimination charge.

Delegation of Litigation Authority to the General Counsel Should Be Scaled Back in Favor of Greater Commission Oversight of Civil Rights Enforcement

When the NEP was first approved by the EEOC in 1996, it authorized the Office of General Counsel (OGC) to commence or intervene in litigation without first having to obtain Commission approval in most cases.³ Part of the reason ostensibly was to increase enforcement efficiencies by eliminating time-consuming reviews by the full Commission. Unfortunately, the delegation of litigation authority has made it much more difficult for the agency to establish uniformly applied policies and consistency across regions, which has detracted from meaningful civil rights enforcement. Nevertheless, the Commission has reaffirmed that delegation repeatedly over the years,

³ The General Counsel since has redelegated that authority to Regional Attorneys in claims brought under or implicating Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act (ADEA), and the Equal Pay Act (EPA).

most recently in October 2016 over the dissents of its two Republican members.

Pursuant to his or her delegated litigation authority, the General Counsel wields considerable power in deciding which cases should be pursued in court. The lack of Headquarters oversight has resulted in national employers that appear before multiple EEOC offices often facing vastly different standards, requirements, and expectations from region to region – not only as to litigated matters, but also with respect to the investigations and other activities preceding it.

Consistency and uniformity in investigative standards has been a common concern over the years. Companies operating in multiple jurisdictions often have complained, for instance, that a “garden variety” discrimination charge capable of expeditious resolution in one region might trigger an “expanded” investigation in another, which in turn is much more likely to evolve into a potential systemic claim and threatened EEOC lawsuit.

For charging parties, these inconsistencies likely contribute to a sense of futility and lack of confidence in the process, and could well dissuade aggrieved persons from filing discrimination charges at all. For employers, it creates an unacceptable level of unpredictability that makes it much more difficult to ensure across-the-board compliance.

Overly Aggressive Litigation Goals Should Yield to Meaningful Efforts to Secure Voluntary Compliance

Title VII authorizes the EEOC to pursue civil action against a respondent believed to have engaged in unlawful discrimination, but only after it has satisfied its statutory duty to “endeavor to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation and persuasion” as a precondition to initiating a public enforcement action. 42 U.S.C. § 2000e-5(b). To be sure, there are times when litigation is unavoidable.

In most instances, however, we believe the EEOC’s goal of preventing and correcting unlawful discrimination can be achieved quite effectively through voluntary means. For that reason, more emphasis should be placed on facilitating and promoting mutual resolution of charges through settlement, and less on the scorched earth litigation tactics pursued in recent years against all manner of respondents.

Mediation has been an effective charge resolution tool utilized nationally by the EEOC since the early 1990’s. Outside evaluations of the

EEOC's mediation program over the years have found a very high level of satisfaction in the program, with over 90% of all employers and employees indicating that they would participate in the program again if given the opportunity to do so. In addition, the EEOC's mediation program has continued to produce favorable results. In FY 2016, for instance, the agency conducted 10,461 mediations, of which 7,989 (76 percent) were resolved successfully and netted charging parties a total of \$163.5 million.

We urge the EEOC to continue to pursue opportunities for informal settlement throughout the charge investigation and resolution process by, among other things, expanding the use of mediation, both at the pre- and the post-cause stages. The EEOC in the past has considered offering mediation at the conciliation stage of the charge resolution process, and we suggest that it do so again.

Once the EEOC has determined that a charge has merit, the dynamics of the situation change significantly, and an employer who may have been disinclined to go to mediation beforehand may now see some value in doing so. The prospect of having an outside party facilitate conciliation is particularly attractive to many EEAC members, some of which in the past have felt pressured by the agency into signing conciliation agreements without being given a meaningful opportunity to negotiate their terms.

The EEOC also could utilize mediation as a viable alternative to litigation upon unsuccessful conciliation efforts. At that stage, an outside neutral with no stake in the outcome of the dispute may greatly assist the parties and the agency in reaching a mutually acceptable resolution that avoids the costs and time involved in federal court litigation.

From an employer's standpoint, the availability of post-conciliation mediation could be extremely valuable. Not only would it give the employer a chance to resolve a case that appears to be destined for federal court, but it also could provide one final opportunity to help to heal "bad blood" between the parties as a result of the adversarial positions taken during the administrative charge resolution process — or that is inevitable should the case proceed to litigation. Of course, the employer ultimately would retain the right (as would the charging party) to decline to participate in mediation, depending on the facts and circumstances of the case.

Whether or not the EEOC were to expand its mediation program to the conciliation stage of the charge resolution process, much more needs to be done, in our view, to assure that *all* charges in which reasonable cause has been found are subject to meaningful, good faith conciliation efforts. In our experience, EEOC investigators have been far too quick to deem conciliation

a failure based merely on a respondent's reasonable inquiries as to the basis of a finding or its efforts to negotiate additional conciliation terms. This cursory treatment of conciliation by some in the field falls short of satisfying the agency's statutory conciliation obligation, and undermines the concept of voluntary settlement as the preferred means of resolving discrimination charges.

We believe that by refocusing its efforts on voluntary compliance, rather than "gotcha" enforcement tactics, the EEOC will be able to achieve its mission-critical strategic aims more efficiently. It also would improve the agency's reputation among the stakeholder community for fairness and even-handedness, and would afford charging parties – many of whom will be unwilling or unable to pursue private litigation – an opportunity to have their claims addressed on terms that are favorable to them.

The EEOC Should Continue to Prioritize Improving the Quality and Timeliness of Charge Investigations and Conciliations

Over the last few years, the EEOC has taken steps to improve the quality of its stakeholder interactions and administrative charge investigation procedures. We believe that quality assurance and top-notch customer service should remain EEOC management priorities. Establishing and implementing a meaningful quality control system for investigations and conciliations not only is important to ensuring that the agency's enforcement objectives are achieved, but it also can serve as a helpful professional staff development tool.

Also relevant to effective civil rights enforcement is the ability to conduct charge investigation as promptly and efficiently as possible. Although Title VII requires the Commission to "make its determination on reasonable cause as promptly as possible and, as far as practicable, not later than one hundred and twenty days from the filing of the charge...", this statutory standard is routinely disregarded. Because seemingly endless investigation of discrimination charges fails to serve the interests of the charging party or respondent, the EEOC should be encouraged, and provided with the necessary resources, to improve the time it takes to conduct charge investigations.

The EEOC also should continue to strive to improve the quality of its conciliation efforts. The EEOC's failure to provide sufficient information on which to evaluate a settlement offer, its refusal to explain the basis for a monetary demand or to identify specific victims and/or class size, its insistence on unreasonable deadlines, and/or its unwillingness to engage the

respondent in meaningful negotiation of terms all can contribute to unsuccessful conciliation.

In *Mach Mining, LLC v. EEOC*, the Supreme Court clarified that to meet its statutory conciliation obligation the EEOC at a minimum “must tell the employer about the claim – essentially, what practice has harmed which person or class – and must provide the employer with an opportunity to discuss the matter in an effort to achieve voluntary compliance.” 135 S. Ct. 1645, 1652 (2015). The EEOC’s current Title VII procedural regulations merely require that the agency attempt to achieve a “just resolution of all violations found,” however. 29 C.F.R. § 1601.24(a).

We believe that the EEOC should revise its procedural regulations consistent with *Mach Mining* to identify specific factors that should be considered in evaluating the sufficiency of agency conciliation efforts. Such a standard would help improve the quality of conciliations by ensuring that employers are provided with a sufficient factual understanding of the agency’s findings, as well as a meaningful opportunity for “voluntary compliance” in every instance.

The EEO-1 Compensation Data Collection Tool Has No Practical Utility as an Enforcement Tool

Last year, the EEOC proposed, and the Obama Administration subsequently approved, significant and expansive revisions to the EEO-1 Report. The EEO-1 Report is an annual filing requirement that obligates covered employers to report the number of employees, per establishment, by each of seven race and ethnicity categories, two gender categories, and ten job groups.

The revised EEO-1 Report now requires employers report summary employee compensation and hours worked broken down by 12 pay bands within each of the ten EEO-1 job groups. The total number of new data fields to be reported by employers each year under these revisions is between 2.9 billion and 4.5 billion, placing a significant new burden on employers.

But this added burden is unlikely to produce any meaningful benefit from an enforcement standpoint, as the new data collection will be of no real help in identifying unlawful or improper pay practices. First, because the form requires employers to submit summary data in categories that likely do not match the way they actually pay their employees, the data produced is not going to be helpful in identifying true disparities.

Second, because the manner in which compensation is to be reported does not allow for consideration of any of the potential variables that can affect total compensation (such as, for instance, part-time or full-time status), any potential “flag” would be unreliable on its face and would require additional refinement. Apart from enforcement, because compensation systems and practices vary so significantly from company to company, the data collected from the revised report would have no real value to employers from a general benchmarking perspective.

Because its implementation would impose substantial burdens on employers with no meaningful enforcement benefit, the EEOC should remove the compensation data collection component from the EEO-1 form, and explore other possible alternatives to enhancing its ability to detect and correct potential compensation discrimination.

Conclusion

Thank you again for the opportunity to testify. I will be pleased to answer any questions you may have.

Chairman BYRNE. Thank you, Ms. Vann. Mr. Cox, you are recognized for five minutes.

**TESTIMONY OF TODD A. COX, DIRECTOR OF POLICY, NAACP
LEGAL DEFENSE AND EDUCATIONAL FUND, INC.**

Mr. COX. Thank you. Good morning, Chairman Byrne, Ranking Member Takano, and members of the subcommittee. My name is Todd Cox, and I am the Director of Policy for the NAACP Legal Defense and Educational Fund.

Thank you for the opportunity to testify at this morning's hearing to express our views regarding the regulatory and enforcement priorities of the U.S. Equal Employment Opportunity Commission.

The EEOC has throughout its existence played a pivotal role in ensuring that all Americans have access to equal opportunities in the workplace, and that there are adequate protections in place so that unlawful employment discrimination is quickly identified and remediated.

An important part of that role has been the EEOC's regulatory and enforcement policies and activities, including its systemic litigation, and its work in emerging areas of discrimination.

Despite the tremendous strides we have made as a nation towards equal opportunity, the EEOC continues to remain an incredibly important and necessary federal agency. There is no question that the EEOC has been incredibly successful in redressing various forms of employment discrimination.

The Commission has been and continues to be a driving force in dismantling segregated workplaces, removing unnecessary and discriminatory employment barriers and obstacles, and ensuring the promise of equality at work could be realized for millions of Americans.

Despite the tremendous progress, however, sadly, our work on eliminating discrimination in the American workplace is far from over. We commend the EEOC's decision to continue to prioritize the initiative revitalized under President George W. Bush's administration and focusing the Commission's resources on redressing systemic discrimination—pattern or practice, policy and/or class-wide investigations and litigation where the alleged discrimination has a widespread impact on industry, employers, or geographic areas.

While individual claims have a place on the Commission's docket, it is imperative that the EEOC continue to maximize its impact by prioritizing systematic enforcement and litigation. An emphasis on systemic enforcement makes perfect sense strategically, because it allows the EEOC to address and remedy workplace discrimination on a large scale.

We also applaud the EEOC's continued reliance on disparate impact liability as a tool through which to prove unlawful discrimination. Disparate impact is more important than ever, especially given that subtle and sophisticated types of discrimination are more commonplace today than instances of overt racial animus.

The EEOC's work concerning the misuse of criminal records in employment highlights the ways in which the Commission is working to address and remedy discriminatory barriers that have disparate impacts on protected groups.

In recent decades, the number of Americans who have some criminal history has increased significantly. The impact of the criminal justice system particularly resonates in communities of color and has important civil rights and racial justice implications.

In response to this growing trend, the EEOC in a bipartisan manner issued enforcement guidance concerning the use of criminal records in employment. I would like to emphasize a few points about the guidance.

First, neither Title VII nor the guidance itself prohibits employers from considering criminal history when they make employment decisions. Second, the guidance describes how employers considering criminal history in a targeted fact-based way can avoid Title VII liability consistent with existing law.

Lastly, it reiterates that the fact of an arrest standing alone does not establish that criminal conduct occurred and that an employer should not rely on an arrest record alone to make employment decisions.

What is important is that people have an opportunity to apply and be considered for jobs for which they are qualified and for which their criminal records are not relevant or predictive. Permanently excluding people from the workforce because of contact with the criminal justice system is inconsistent with Title VII.

The EEOC's work on the guidance is consistent with the growing national and bipartisan consensus that we need to rethink our criminal reentry systems to ensure that millions of Americans who have a criminal record are afforded a second chance, and ultimately, that our communities are safer and more economically stable.

The 53rd anniversary of the *Civil Rights Act of 1964* provides a timely opportunity to pause and consider the regulatory and enforcement priorities of the EEOC. Undoubtedly, the EEOC should be applauded for the tremendous role it has played in helping to ensure that American workers are not being denied equal opportunity.

The Commission must continue its work of developing new and innovative ways to combat unlawful discrimination. As Naomi Earp, who served as Chair of the EEOC under President George W. Bush once remarked, "New times demand new strategies to stay ahead of the curve. These old evils are still around in new forms, and the Commission intends to act vigorously to eradicate them."

Accordingly, we should take this opportunity to ensure that the EEOC has the resources it needs to continue its critically important work.

Thank you for the opportunity to testify. I look forward to your questions.

[The statement of Mr. Cox follows:]



**Testimony of Todd A. Cox
Director of Policy
NAACP Legal Defense and Educational Fund, Inc.**

**Before the United States House of Representatives
Committee on Education and the Workforce
Subcommittee on Workforce Protections**

**Hearing on
“The Need for More Responsible Regulatory and Enforcement
Policies at the EEOC”**

**Rayburn House Office Building
Room 2175**

May 23, 2017

Good morning Chairman Byrne, Ranking Member Takano, and members of the Subcommittee. My name is Todd Cox and I am the Director of Policy for the NAACP Legal Defense & Educational Fund, Inc. ("LDF" or the "Legal Defense Fund"). Thank you for the opportunity to testify in this morning's hearing to express our views regarding the regulatory and enforcement priorities of the United States Equal Employment Opportunity Commission ("EEOC" or the "Commission"). As I will explain in greater detail during my testimony, the EEOC has, throughout its nearly 52-year existence, played a pivotal role in assuring that all Americans have access to equal opportunity in the workforce and that there are adequate protections in place so that unlawful employment discrimination is quickly identified and remedied. An important part of that role has been the EEOC's regulatory and enforcement policies and activities, including its systemic litigation and its work in emerging areas of discrimination, such as the use of criminal background checks in employment. Despite the tremendous strides we have made as a nation towards equal opportunity, the EEOC continues to remain an incredibly important and necessary federal agency.

LDF, which was founded by Thurgood Marshall in 1940, is the nation's oldest civil rights law organization. Throughout our history, we have relied on the Constitution, as well as federal and state civil rights laws, to pursue equality and justice for African Americans and other people of color, and have worked to enforce anti-discrimination principles in the areas of employment, public accommodations, education, housing, political participation, and criminal justice.

In just over one month, we will celebrate the 53rd anniversary of the Civil Rights Act of 1964, signed into law July 2, 1964. Without question, the Civil Rights Act of 1964 is one of the most important pieces of civil rights legislation ever enacted by Congress to ensure that our country keeps its promise of equality and justice. While the Civil Rights Act of 1964 included a number of anti-discrimination provisions, including the prohibition of discrimination in public accommodations, it is perhaps best known for Title VII, which outlawed discrimination in employment on the basis of race, color, religion, sex, or national origin.¹ As Professor Robert Belton, a former LDF lawyer who litigated some of the first cases under Title VII and became a renowned employment discrimination scholar, observed: "Of the eleven titles in the Civil Rights Act of 1964, Title VII has emerged as having the most significant impact in helping to shape the legal and policy discourse on the meaning of equality."² The creation of the EEOC as the agency charged with receiving, investigating and referring complaints of employment discrimination for litigation, was a core aspect of the bipartisan compromise that resulted in Title VII.

Since the enactment of Title VII, LDF has worked to enforce this landmark statute, challenging discriminatory practices of both private and public employers, and serving on the front lines of many great civil rights battles seeking equal opportunity in employment for all.³ From this vantage point, the Legal Defense Fund has had a unique opportunity to observe the work of

¹ 42 U.S.C. §§2000e et seq.

² Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination*, 22 Hofstra Lab. and Emp. L.J. 431, 432 (2005).

³ See, e.g., *Lewis v. City of Chicago*, 130 S. Ct. 2191 (2010); *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867 (1984); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

the EEOC and to assess its effectiveness. Indeed, beginning in 1965 when the EEOC opened its doors for the first time, we litigated many of the seminal cases that initially interpreted the meaning and scope of Title VII, including *Griggs v. Duke Power Company*⁴ and *Albemarle Paper Company v. Moody*.⁵ And within the first year of the EEOC's operation, LDF filed nearly a thousand complaints of racial discrimination with the Commission under the leadership of our second President and Director-Counsel Jack Greenberg.⁶ As a result of this history, we fully understand and appreciate the critical role that Title VII has played in literally changing the face and composition of the American workforce.

Today, we too often accept the integration of the American workforce without recognizing the role that the EEOC and Title VII have played in helping to open doors to employment and opportunity that were closed simply because of an applicant's or worker's race or gender. We forget that it is only within the last 52 years—my lifetime—that American workers have enjoyed legal protection from discrimination based on race, sex, national origin and color. Just as the Civil Rights Act of 1964 made possible the diversity we have come to take for granted in restaurants, and in courthouses and hotels throughout this country, so too did Title VII and the EEOC make possible the diversity in the American workforce that is reflected in offices, factories, stores and businesses throughout this country.

The EEOC, like Title VII more generally, was designed to achieve its goals, as much as possible, through cooperation, voluntary compliance, and informal conciliation.⁷ However, it has also been long recognized, especially by the Equal Employment Opportunity Act of 1972,⁸ which significantly expanded the EEOC's enforcement authority, that the Commission also needs to rely on litigation as another tool to ensure that employers are complying with federal anti-discrimination laws.

There is no question that the EEOC has been incredibly successful in redressing various forms of employment discrimination. The Commission has been a driving force in dismantling segregated workplaces, removing unnecessary and discriminatory employment barriers and obstacles, and ensuring that the promise of equality at work could be realized for millions of Americans. The EEOC's local and regional offices have often been relied upon by communities of color and other historically marginalized populations for redressing discrimination and harassment often suffered on a daily basis. For example, in Birmingham, Alabama, the local EEOC office was known to many in the African-American community, not by its title or as a government agency, but simply as the "2121 Building," because this was the address one visited in downtown Birmingham if one was seeking protection from discrimination on the job.

⁴ 401 U.S. 424 (1971).

⁵ 422 U.S. 405 (1975).

⁶ Jack Greenberg, *Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution*, 304-05 (1994).

⁷ See *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367-68 (1977) ("Congress, in enacting Title VII, chose cooperation and voluntary compliance . . . as the preferred means of achieving its goals.") (internal quotation marks and citation omitted).

⁸ 42 U.S.C. §2000a.

In fiscal year 2016 alone, the EEOC received nearly 92,000 charges of discrimination.⁹ Of those charges, 32,309 (or 35.3 percent) involved allegations of racial discrimination, 26,934 (or 29.4 percent) involved allegations of sex discrimination, 28,073 (or 30.7 percent) involved discrimination based on disability status, and 20,857 (or 22.8 percent) involved allegations of age discrimination.¹⁰ In fiscal year 2016, the EEOC negotiated 4,927 settlements and successfully conciliated 764, and received 65,090 charges of discrimination with respect to Title VII alone.¹¹ During that same period, the Commission litigated 171 lawsuits under the array of federal statutes it has authority to enforce, including Title VII (84 lawsuits) and the American with Disabilities Act (“ADA”) (48 lawsuits), recovering \$52.2 million in monetary benefits for victims of discrimination.¹²

The number of charges filed with the EEOC, while high, does not come close to fully representing the millions of Americans who still endure unlawful discrimination and mistreatment in their workplaces. For example, recent national surveys show that approximately one out of every four working women and one out of every ten working men have experienced some form of harassment while on the job.¹³ Many of those workers, however, never report that harassment or file a charge of discrimination.

Nationwide, the unemployment rate is approximately 4.7 percent; for Latinos the rate is 5.6 percent, and for African Americans it is 8.1 percent. Discrimination in hiring remains a key factor for these large and unacceptable racial disparities. For example, an empirical study has demonstrated that resumes with “white sounding” names were 50 percent more likely to receive a callback than comparable resumes with “African-American sounding” names.¹⁴ In addition, employment discrimination has significant economic costs. More than 2 million workers leave their jobs each year due to workplace discrimination, costing U.S. employers \$64 billion annually.¹⁵

Despite the tremendous progress made toward increasing equal opportunity in employment, sadly our work on eliminating discrimination in the American workplace is far from over. The EEOC continues to play a critical role in the ongoing work of eradicating employment discrimination. This work goes to the very core of what we aspire to be as a nation—a place where no one can be barred from employment simply based on stereotypes about their fitness for work, racial animus or hostility. The ability to obtain employment, to be promoted at one’s place of employment based on the successful work performance, and to be appropriately and equally

⁹ Equal Employment Opportunity Comm’n, *Charge Statistics FY 1997 through FY 2016*, (2016), <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>.

¹⁰ *Id.*

¹¹ Equal Opportunity Employment Comm’n, *Title VII of the Civil Rights Act of 1964 Charges (Charges filed with EEOC)* (includes concurrent charges with ADEA, ADA and EPA) FY 1997-FY 2016 (2016) <https://www.eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm>.

¹² Equal Opportunity Employment Comm’n, *EEOC Litigation Statistics, FY 1997 through FY 2016* (2016), <https://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm>.

¹³ Gary Langer, *One in Four U.S. Women Reports Workplace Harassment*, ABC NEWS, Nov. 16, 2011, <http://abcnews.go.com/blogs/politics/2011/11/one-in-four-u-s-women-reports-workplace-harassment/>.

¹⁴ Marianne Bertrand and Sendhil Mullainathan, *Are Emily and Brendan More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV., 991, 998 (2004).

¹⁵ Level Playing Field Institute, *The Cost of Employee Turnover Due Solely to Unfairness in the Workplace*, (2007) <http://www.lpfi.org/wp-content/uploads/2015/05/cl-executive-summary.pdf>.

compensated for that work as similarly situated workers, goes to the principle of dignity that Title VII was designed to protect.

Discrimination still remains a pervasive problem in far too many workplaces all across the country. One need look only to recent EEOC court victories to understand that even the most pernicious forms of racism on the job unfortunately still exist. In 2012, a Texas jury awarded punitive damages to three African-American manufacturing employees subjected to racially offensive slurs and a noose in the workplace, including use of the “N” word by a top plant official who responded to complaints about the noose with the comment, “You people are too sensitive.”¹⁶ In 2013, a North Carolina jury unanimously found that African-American truck drivers, who were called the “N” word, “monkey” and “boy” and threatened with nooses by a manager and a co-worker, were harassed and retaliated against because of their race.¹⁷ In 2014, the EEOC secured relief for an African-American technician in Arkansas who was subjected to racially offensive language and visited at home in the middle of the night by two white co-workers threatening to kill him if he complained further about racial harassment.¹⁸

As an organization with an active employment discrimination docket, we at the Legal Defense Fund know only too well the extent to which employment discrimination against African Americans and other protected classes persists. In 2013, we settled a class action employment discrimination case against the national women’s clothing retailer Wet Seal; the lawsuit alleged that top executives at Wet Seal directed senior managers to get rid of African-American store managers and replace them with white employees for the sake of its “brand image.”¹⁹ For example, one senior Wet Seal executive ordered a district manager to “clean the entire store out” after observing numerous African-American employees working there.²⁰ One of the plaintiffs in the case, an African-American woman, observed the same executive express dismay that the plaintiff had been hired as a manager despite the fact that she did not have “blond hair and blue eyes.”

In 2010 we also successfully concluded our representation of thousands of African Americans in Chicago who were unlawfully denied jobs as firefighters in a case that worked its way up to the United States Supreme Court.²¹ And not long ago, the United States Court of Appeals for the Eleventh Circuit agreed with our position in *Ash v. Tyson Foods* that a white supervisor calling a black employee “boy” was evidence of racial animus that could support a finding of employment discrimination.²² Sadly, these are only a few of the countless other recent and present-day examples of continued discrimination and harassment in the workplace. LDF is

¹⁶ Press Release, U.S. Equal Employment Opportunity Comm’n, Jury Says AA Foundries Must Pay \$200,000 for Creating Racially Hostile Work Environment (Sept. 27, 2012), <http://www.eeoc.gov/eeoc/newsroom/release/9-27-12g.cfm>.

¹⁷ Press Release, U.S. Equal Employment Opportunity Comm’n, Federal Court Grants Injunction Against A.C. Widenhouse in EEOC Race Harassment Case (Mar. 8, 2013), <http://www.eeoc.gov/eeoc/newsroom/release/3-8-13.cfm>.

¹⁸ Press Release, U.S. Equal Employment Opportunity Comm’n, MMR Constructors Settles EEOC Racial Harassment Lawsuit (Jan. 27, 2014), <http://www.eeoc.gov/eeoc/newsroom/release/1-27-14.cfm>.

¹⁹ Complaint at 8, *Cogdell v. Wet Seal*, No. 12-01138 (C.D. Cal. July 7, 2012).

²⁰ *Id.* at 7.

²¹ *Lewis v. City of Chicago, Ill.*, 560 U.S. 205 (2010).

²² *Ash v. Tyson Foods, Inc.*, 664 F.3d 883 (11th Cir. 2011).

actively investigating other allegations of employment discrimination and we will continue to pursue all available remedies to combat unlawful employment practices, including race- based harassment, but we need an EEOC that is active in its regulatory and enforcement role to help ensure that we effectively combat this discrimination.

LDF's and the EEOC's dockets also reflect the pervasive manner in which discrimination occurs in the 21st Century when it has become vanishingly rare to find a policy that explicitly discriminates on the basis of race. Last year, in support of an EEOC case, LDF filed an amicus brief in *EEOC v. Catastrophe Management Solutions* in the Eleventh Circuit Court of Appeals. The brief argued in support of a petition for rehearing en banc in this case, which considered whether Title VII's broad mandate to purge the workplace of racial discrimination reaches a policy that promotes racial stereotypes regarding beauty and professionalism. In this case, the employer withdrew an offer of employment to the charging party because she refused to cut her dreadlocks, using a grooming policy to give effect to its preference for white hair texture and against Black hair texture. This case remains a stark example of the racial discrimination that endures in the modern workplace, and the devastating consequences of racial stereotyping. We encourage the EEOC to continue to root out this type of discrimination through its regulatory and enforcement policies.

In particular, we commend the EEOC's decision to continue to prioritize the initiative revitalized under President George W. Bush's administration of focusing the Commission's resources on redressing systemic discrimination—i.e., pattern or practice, policy and/or class-wide investigations and litigation where the alleged discrimination has a widespread impact on an industry, employer, or geographic area. The EEOC's Systemic Task Force, which was established in 2005 under the direction of then-EEOC Chair Cari Dominguez and led by then- Commissioner Leslie Silverman, was premised on "the recognition that the Commission cannot effectively combat discrimination without a strong nationwide systemic program."²³ We could not agree more.

While individual claims have a place on the Commission's docket, it is imperative that the EEOC continue to maximize its impact by prioritizing systematic enforcement and litigation. The litigation of systemic discrimination claims is very costly, often complicated and is regularly protracted and hotly contested. Simply put, they are some of the hardest and most complex cases to litigate. And that is why they are precisely the types of cases which the federal government should be bringing. Our country cannot hope to rid the workplace of employment discrimination on an individual case-by-case basis. Moreover, many of these cases would never be prosecuted by the private bar or civil rights organizations with limited resources, especially when the discrimination is occurring in underserved communities or the likelihood of obtaining significant monetary relief is minimal. An emphasis on systemic enforcement makes perfect sense strategically because it allows the EEOC to address and remedy workplace discrimination on a large scale. The EEOC was wise to adopt a new Strategic Enforcement Plan for fiscal years 2017-2021, which allows the Commission to focus its own limited resources on the areas where

²³ U.S. Equal Employment Opportunity Comm'n, Systemic Task Force Report to the Chair of the Equal Employment Opportunity Commission (March 2006), http://www.eeoc.gov/eeoc/task_reports/systemic.cfm.

discrimination remains entrenched and far-too-common.²⁴

The Commission's victory in *EEOC v. Hill Country Farms, Inc.*²⁵ serves as a powerful reminder of the impact of the EEOC's focus on systemic and strategic enforcement. In that litigation, the EEOC represented 32 men with intellectual disabilities who were subjected, over the course of more than two decades, to harassment and discrimination, including verbal and physical abuse and sub-standard and otherwise deplorable living conditions.²⁶ As a result of the EEOC's advocacy, an Iowa jury awarded the men damages totaling \$240 million. In 2014, the EEOC reached a \$1.4 million settlement with JPMorgan Chase over allegations that the company maintained a sexually hostile work environment towards female mortgage bankers who worked at an Ohio location.²⁷ The settlement also requires JPMorgan to revise its data retention procedures in order to prevent future harassment.

More recently, in April 2016, the EEOC represented three applicants and a class of African-American and non-Hispanic applicants against Lawler Foods because the bakery failed to hire individuals on account of their race.²⁸ The EEOC reached an agreement requiring the bakery to pay over \$1 million.²⁹ In March 2016, EEOC settled another case resulting in Mavis Discount Tire, Inc. to pay \$2.1 million to 46 women because the company refused to hire women for field positions.³⁰ Shortly before that, the EEOC settled a case against Hillshire Brands Company (formerly known as the Sara Lee Corporation) requiring Hillshire to pay \$4 million to 74 former African-American employees who were subjected to a racially hostile work environment.³¹ The employees experienced racist graffiti on bathroom and locker walls and were called racial slurs, all while complaints were ignored by management.³²

We also applaud the EEOC's continued reliance on disparate impact liability as a tool through which to prove unlawful discrimination. The United States Supreme Court, in its landmark decision, *Griggs v. Duke Power Co.*, recognized that Title VII not only prohibits overt racial discrimination, but also "practices, procedures, or tests neutral on their face, and even neutral in

²⁴ In the U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2017-2021, the Commission identified six substantive priorities, including: (i) eliminating barriers in recruitment and hiring; (ii) protecting vulnerable workers, including immigrant and migrant workers, and underserved communities from discrimination; (iii) addressing selected emerging and developing issues; (iv) ensuring equal pay protections for all workers; (v) preserving access to the legal system; and (vi) preventing systematic harassment.

²⁵ *EEOC v. Hill Country Farms, Inc.*, 13-2796, 2014 WL 1813434 (8th Cir. May 8, 2014).

²⁶ Press Release, U.S. Equal Employment Opportunity Comm'n, Jury Awards \$240 Million for Long-Term Abuse of Workers with Intellectual Disabilities (May 1, 2013), <http://www.eeoc.gov/eeoc/newsroom/release/5-1-13b.cfm>.

²⁷ Press Release, U.S. Equal Employment Opportunity Comm'n, JPMorgan Chase Will Pay \$1,450,000 to Resolve EEOC Class Sex Discrimination Lawsuit (Feb. 3, 2014), <http://www.eeoc.gov/eeoc/newsroom/release/2-3-14.cfm>.

²⁸ Press Release, U.S. Equal Employment Opportunity Comm'n, Lawler Foods to Pay over \$1 Million to Settle EEOC Race and National Origin Discrimination Suit (April 26, 2016), <https://www.eeoc.gov/eeoc/newsroom/release/4-26-16.cfm>.

²⁹ *Id.*

³⁰ Press Release, U.S. Equal Employment Opportunity Comm'n, Mavis Discount Tire to Pay \$2.1 Million to Settle EEOC Class Sex Discrimination Lawsuit (March 25, 2016), <https://www1.eeoc.gov/eeoc/newsroom/release/3-25-16.cfm>.

³¹ Press Release, U.S. Equal Employment Opportunity Comm'n, Hillshire Brands Company Pays \$4 Million to Settle Race Discrimination Suit (Dec. 22, 2015), <https://www.eeoc.gov/eeoc/newsroom/release/12-22-15.cfm>.

³² *Id.*

terms of intent” that “operate to ‘freeze’ the status quo of prior discriminatory employment practices.”³³ Disparate impact is more important than ever, especially given that subtle and sophisticated types of discrimination are more commonplace today than instances of overt racial animus. The success of the Civil Rights Movement and the legislation it produced means that racial discrimination is no longer socially acceptable. This cultural change has helped reduce some racial discrimination. In other instances, however, discrimination has been driven underground, where it is vibrantly practiced but masked by code-words and pretexts. As the United States Court of Appeals for the Third Circuit has explained:

Anti-discrimination laws and lawsuits have ‘educated’ would-be violators such that extreme manifestations of discrimination are thankfully rare. Though they still happen, the instances in which employers and employees openly use derogatory epithets to refer to fellow employees appear to be declining. Regrettably, however, this in no way suggests that discrimination based upon an individual’s race, gender, or age is near an end. Discrimination continues to pollute the social and economic mainstream of American life, and is often simply masked in more subtle forms. It has become easier to coat various forms of discrimination with the appearance of propriety, or to ascribe some other less odious intention to what is in reality discriminatory behavior. In other words, while discriminatory conduct persists, violators have learned not to leave the proverbial ‘smoking gun’ behind.³⁴

Disparate impact cases are often extremely challenging and can be very costly, especially given that they often involve analyzing large sets of data and require the retention of legal experts. But, if we are committed to ridding our nation’s workplaces of unlawful discrimination, these are precisely the types of cases the EEOC needs to be litigating.

The EEOC’s recent actions concerning the misuse of criminal background checks in employment highlight the ways in which the Commission is working to address and remedy discriminatory barriers that have disparate impacts on protected classes. In recent decades, the number of Americans who have some sort of criminal record has increased significantly. Incarceration rates in the United States have more than tripled since the 1980s.³⁵ As a result of this increase, the United States currently constitutes approximately five percent of the world’s population but holds 25 percent of the world’s prison population.³⁶ This rapid increase is largely attributable to the increased incarceration of non-violent drug offenders over the last three decades.

From 1975 to 2005 the United States’ incarceration rate increased by 342 percent.³⁷ Criminal justice policies that led to this incarceration rate surge continue to drive racial inequality and poverty. If not for mass incarceration, one study reports that the overall poverty rate would have dropped by 20 percent between 1980 and 2004.³⁸ One-in-three Americans are estimated to

³³ 401 U.S. at 430 (1971). Congress codified disparate impact liability under Title VII in the 1991 Civil Rights Act. See The Civil Rights Act of 1991, Pub. L. No. 102-166.

³⁴ *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1081-82 (3d Cir. 1996).

³⁵ U.S. Dep’t of Justice, Bureau of Justice Statistics, *Correctional Populations in the United States 1998* (2002); Paige M. Harrison & Allen J. Beck, U.S. Dep’t of Justice, Bureau of Justice Statistics, *Prisoners in 2003* (2004).

³⁶ Marc Mauer, *Race to Incarcerate*, 15-14 (1999).

³⁷ Robert DeFina & Lance Hannon, *The Impact of Mass Incarceration on Poverty*, SAGE JOURNALS Vol. 59, Issue 4 (2013) <http://journals.sagepub.com/doi/abs/10.1177/0011128708328864>.

³⁸ *Id.* at 20.

have a criminal record.³⁹ Although many have minor offenses, having a criminal record creates barriers to opportunity, such as employment, and is linked as a direct cause and consequence of poverty.⁴⁰ Unfortunately, data show that one year after their release, 60 percent of formerly incarcerated individuals remain unemployed.⁴¹ And, for those able to find employment, most have considerably diminished earnings.⁴² This has larger economic impacts as well, as excluding the formerly incarcerated and those with felony convictions results in a loss of about 1.7 to 1.9 million workers equivalent to about 0.9 to 1.0 percentage-point reduction in the employment rate, and the loss of between \$78 and \$87 billion in GDP.⁴³

The impact of the criminal justice system particularly resonates in communities of color. People of color are disproportionately represented in our prison system as they represent more than 60 percent of the prison population,⁴⁴ but makeup 37.9 percent⁴⁵ of the U.S. population. African Americans and Latinos in particular are overrepresented in the prison system. African Americans make up less than 13 percent⁴⁶ of the U.S. population but are 40 percent of the prison population.⁴⁷ Of the Black men born in 2001, one in three will be incarcerated, and one in six Latino men will go to prison.⁴⁸ The prevalence of arrest rates and criminal convictions are far higher among African Americans and Latinos than for whites: African Americans are 2.5 times more likely to be arrested than whites.⁴⁹ These racial disparities are not explained by disproportionate rates of criminal

³⁹ Rebecca Vallas & Sharon Dietrich, *One Strike and You're Out*, CENTER FOR AMERICAN PROGRESS 1 (Dec. 2014), <https://cdn.americanprogress.org/wp-content/uploads/2014/12/VallasCriminalRecordsReport.pdf>.

⁴⁰ *Id.*

⁴¹ Rebecca Vallas et al., *Removing Barriers to Opportunity for Parents with Criminal Records and Their Children*, CENTER FOR AMERICAN PROGRESS 4 (Dec. 2015), <https://cdn.americanprogress.org/wp-content/uploads/2015/12/09060720/CriminalRecords-report2.pdf>.

⁴² *Id.*

⁴³ Cherrie Bucknor & Alan Barber, *The Price We Pay: Economic Costs of Barriers to Employment*, CENTER FOR ECONOMIC AND POLICY RESEARCH 1 (June 2016), <http://cepr.net/images/stories/reports/employment-prisoners-felonies-2016-06.pdf>.

⁴⁴ Trends in U.S. Corrections, The Sentencing Project, <http://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf>.

⁴⁵ See U.S. Census, Quick Facts <https://www.census.gov/quickfacts/table/PST045216/00>.

⁴⁶ *Id.*

⁴⁷ Peter Wagner and Bernadette Rabuy, *Mass Incarceration*, PRISON POLICY INITIATIVE (Mar. 14, 2017), <https://www.prisonpolicy.org/reports/pic2017.html>.

⁴⁸ Trends in U.S. Corrections, The Sentencing Project, <http://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf>.

⁴⁹ Recent statistics from the FBI show that African Americans accounted for more than 3 million arrests in 2009 (28.3 percent of total arrests), even though they represented just 12.9 percent of the general population; whites, who formed 75.6 percent of the general population, accounted for fewer than 7.4 million arrests (69.1 percent of total arrests). Crime in the United States, 2009 U.S. Department of Justice — Federal Bureau of Investigation (Sept. 2010) tbl. 43, <http://www2.fbi.gov/ucr/cius2009/arrests/index.html>. Among persons arrested on felony charges in 2006, 29 percent were white, while 45 percent were black and 24 percent were Latino. Bureau of Justice Statistics, U.S. Dep't of Justice, *Felony Defendants in Large Urban Counties, 2006*, app. tbl. 2 (2010). Similar disparities are seen in conviction rates as well. One recent estimate found that nearly one-fourth of the black adult male population (23.3 percent) has at least one felony conviction but is not currently under any form of criminal justice supervision, while that figure is only 9.2 percent for the adult male population as a whole. Christopher Uggen, Jeff Manza & Melissa Thompson, *Citizenship, Democracy and the Civic Reintegration of Criminal Offenders*, 605 *Annals Am. Acad. Pol. & Soc. Sci.* 281, 288 & tbl. 2 (2006); see also Marc Maurer and Ryan S. King, *Uneven Justice: State Rates of Incarceration by Race and Ethnicity*, 3 (2007), http://www.sentencingproject.org/doc/publications/rd_stateratesofincbyraceandethnicity.pdf (finding African Americans incarcerated 5.6 times rate of whites, Hispanics incarcerated at 1.8 times rate of whites).

activity—one study found that in 2005, African Americans represented 14 percent of current drug users, yet they constituted 33.9 percent of persons arrested for drug offenses.⁵⁰ Rather, they demonstrate the roles that racial profiling and discriminatory criminal justice policies have played and continue to play in our criminal justice system.⁵¹

This has important civil rights and racial justice implications. A 2004 study by Professor Devah Pager found that white job applicants with a criminal record were called back for interviews more often than equally-qualified black applicants who did not have a criminal record, attributing this to the effect of employers' consideration of both race and criminal background.⁵² According to Professor Pager, the criminal justice system plays a central role in "sorting and stratifying labor market opportunities" for those with criminal records.⁵³ Employment policies and practices that apply a blanket exclusion of those with criminal records can lead directly to the disproportionate exclusion of African Americans and Latinos from the workforce with the attendant impact on their economic security and opportunity.

In response to this growing trend, the EEOC, in a bipartisan manner, issued enforcement guidance, entitled *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended*, 42 U.S.C. § 2000e et seq.⁵⁴ The Commission met publicly to discuss this subject in 2008 and July 2011 and those meetings, the testimony and over 300 written comments helped inform the Commission's consideration of revisions to existing EEOC guidance, issued originally in 1987 and 1990. The updated guidance clarifies and updates the EEOC's longstanding policy concerning the use of arrest and conviction records in employment. I would like to emphasize a few points about the guidance.

First, neither Title VII nor the guidance prohibits employers from considering criminal history when they make employment decisions. Second, the guidance describes how employers considering criminal history in a targeted, fact-based way can avoid Title VII liability consistent with existing law. It is also consistent with how many employers already assess criminal history. Lastly, it reiterates that the fact of an arrest, standing alone, does not establish that criminal conduct occurred and an employer should not rely on arrest alone to make employment decisions. This is done because an arrest is an accusation and does carry the same weight as a conviction; also, arrest records can be unreliable and inaccurate. What is important is that people have an opportunity to apply and be considered for jobs for which they are qualified and for which their criminal records

⁵⁰ Marc Mauer, *Justice for All? Challenging Racial Disparities in the Criminal Justice System*, Am. Bar Ass'n (2010). A recent report by the American Civil Liberties Union ("ACLU") found that "Black people are 3.7 times more likely to be arrested for marijuana possession than white people despite comparable usage rates." Press Release, ACLU, *New ACLU Report Finds Overwhelming Racial Bias in Marijuana Arrests* (June 4, 2013), <https://www.aclu.org/criminal-law-reform/new-aclu-report-finds-overwhelming-racial-bias-marijuana-arrests>.

⁵¹ See, e.g., Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010); Marc Mauer, *Mass Imprisonment and the Disappearing Voters*, in *Invisible Punishment* 53 (Marc Mauer & Meda Chesney-Lind eds., 2002) (discussing war on drugs).

⁵² Devah Pager, *The Mark of a Criminal Record*, 108 AM. JOURNAL OF SOCIOLOGY 937, 957-60 (2003), <http://www.irp.wisc.edu/publications/focus/pdfs/foc232i.pdf>.

⁵³ *Id.* at 46.

⁵⁴ U.S. Equal Employment Opportunity Comm'n, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended*, 42 U.S.C. § 2000e et seq. (April 25, 2012).

are not relevant or predictive. Permanently excluding people from the workforce because of contact with the criminal justice system is inconsistent with Title VII.

The EEOC's guidance was designed to consolidate, clarify, and update prior guidelines the Commission had promulgated on the topic, guidelines—initially issued in 1987 when now-Supreme Court Justice Clarence Thomas was serving as Chair—that had become outdated and did not reflect recent factual and legal developments.⁵⁵ It is important to note that the EEOC's guidance does not prevent or discourage the use of criminal background checks. Instead, it clearly sets forth how employers' use of criminal history information can, in some instances, violate Title VII. The EEOC, relying on social science research showing that African-American job applicants without criminal records are less likely than white applicants with criminal records to get called back for interviews or receive offers of employment,⁵⁶ discusses how employers can violate Title VII's disparate treatment provision if they treat similarly situated individuals with criminal histories differently because of their race. The guidance goes on to explain that even criminal records policies that are facially race-neutral can result in disparate impact liability if they disproportionately impact racial minorities (or other protected groups) and are neither job related nor consistent with business necessity. In order to avoid violating Title VII, the guidance recommends employers, when developing criminal records policies, consider three sensible factors: (i) the nature and gravity of the prior criminal conduct, (ii) the time that has elapsed since the prior criminal conduct, and (iii) the nature of the job held or sought.⁵⁷ The EEOC's guidance makes clear that consideration of these factors is important for ensuring that exclusions based on criminal records are not overly broad, but are related to the positions at issue and necessary from a business perspective. Indeed, LDF, the National Employment Law Project and the Leadership Conference on Civil and Human Rights filed an amicus brief in *Guerrero v. California Department of Corrections and Rehabilitation*, a case before the Ninth Circuit Court of Appeals, arguing that the court should rely on the EEOC guidance in determining whether particular employers' criminal background check policies unfairly exclude applicants of color.⁵⁸

The EEOC's work on the guidance is not only commendable, it is also consistent with the growing national and bipartisan consensus that we need to rethink our criminal reentry systems

⁵⁵ See Equal Employment Opportunity Comm'n, *Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964* (Feb. 4, 1987); Equal Employment Opportunity Comm'n, *Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment* (July 29, 1987); Equal Employment Opportunity Comm'n, *Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964* (Sept. 7, 1990).

⁵⁶ One study, demonstrated that White job applications with a criminal record who had the same qualifications as African-American applicants without criminal record were three times more likely to be invited for interviews than the African-American applicants. Devah Pager, *The Mark of a Criminal Record*, 108 Am. Journal of Sociology 937, 957-60 (2003). The results of that study, which provides powerful evidence that some employers may be discriminated against African-American applicants, and especially those with criminal records, has been replicated in other research. See, e.g., Devah Pager, Bart Bonikowski, & Bruce Western, *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 Am. Sociological Rev. 777, 785 (2009).

⁵⁷ These factors, also known as the "Green factors," are based on a 1975 decision by the United States Court of Appeals for the Eighth Circuit. See *Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290 (8th Cir. 1975). In that decision, the court concluded that an employer's policy that disqualified applicants for employment for any criminal conviction other than a minor traffic offense violated Title VII's disparate impact protections.

⁵⁸ Brief for Victor Guerrero as Amicus Curiae Supporting the Plaintiff, *Guerrero v. Cal. Dep't of Corrections and Rehabilitation*, et al., http://www.naacpldf.org/files/case_issue/Guerrero%20LDF%20Amicus%20Brief.pdf.

to ensure that millions of Americans who have a criminal record, but who have paid their debt to society and are qualified for work, are not unjustly denied the opportunity to reintegrate back into society by the misuse of criminal background checks. To allow the presence of an arrest or conviction record to bar an individual from meaningful employment forever, would deny to millions that most powerful and important American opportunity—a second chance.

The EEOC has also been active enforcing the law in this area. For example, in 2013, the EEOC sued BMW for violating Title VII of the Civil Rights Act for enforcing a criminal background policy that disproportionality screened out African Americans from jobs.⁵⁹ BMW contracted with a company that managed its local operation who had employed these workers for several years.⁶⁰ When a new contractor started, BMW ordered that contractor to use BMW's policy, subjecting these employees to a background check that automatically excluded those with criminal backgrounds without assessing the nature and severity of the crime, the age of the conviction, or the claimants' long work history at the company.⁶¹ BMW settled this suit, paying \$1.6 million and offering employment opportunities to the discharged workers in the suit and up to 90 African-American applicants who BMW's contractor refused to hire based on BMW's previous conviction records policy.⁶²

The EEOC also sued Dollar General in 2013 alleging Dollar General violated Title VII by having a criminal history background policy that barred anyone with a conviction from working at the retailer, resulting in a disparate impact against Black individuals.⁶³ In the suit, EEOC alleges that an applicant's offer was rescinded after it was discovered that she had a six-year-old drug possession conviction, even though she had been a cashier at another store for four years.⁶⁴ Another applicant was rejected because of a conviction that appeared on her record in error. When she notified Dollar General that the conviction record was a mistake, the retailer nevertheless refused to hire the applicant.⁶⁵ The lawsuit is pending.

We are seeing the fruits of the EEOC's leadership in this area across the country. Several companies and jurisdictions have adopted so-called "ban-the-box" policies, delaying the consideration of criminal records until later in the employment process, a policy recommended by the EEOC guidance. Nationwide over 150 cities and counties have adopted ban the box. Twenty-five states have adopted ban the box policies and 9 states have removed the conviction history question on job applications for private employers.⁶⁶ As part of the President's Obama's Fair Chance Business Pledge, over 100 companies, businesses, and employers indicated that they are "committed to providing individuals with criminal records . . . a fair chance to participate in the

⁵⁹ Press Release, U.S. Equal Employment Opportunity Comm'n, EEOC Files Suit Against Two Employers for Use of Criminal Background Checks (June 11, 2013), <https://www.eeoc.gov/eeoc/newsroom/release/6-11-13.cfm>.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Michelle Natividad Rodriguez and Beth Avery, *Ban the Box* (Feb. 1, 2017), <http://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/>.

American economy” including Facebook, Google, Koch Industries, the Coca-Cola Company, Pepsi Co., and Xerox.⁶⁷

Additionally, according to a 2015 survey of over 500 employers by EmployeeScreenIQ, fewer employers are asking candidates about their criminal history on job applications, decreasing from 66 percent last year, to 53 percent this year.⁶⁸ Companies using individualized assessments for candidates who have conviction records, also recommended by the EEOC guidance, increased this year to 72 percent from 64 percent.⁶⁹

There is also evidence that these policies have been successful. One study that analyzed the experiences of finding employment for 740 formerly incarcerated people found that 8 months after release, 80 percent of employed respondents stated that their employers knew about their criminal record.⁷⁰ This is consistent with the results of focus groups conducted by the U.S. Department of Labor’s Center for Faith-Based and Community Initiatives in 2002, in which employers of people with criminal records said: “One of the [people with records] we hired is now a store manager, and another is an assistant manager. Each has excellent management skills and both are great mentors to other [people with records] we’ve hired”; and, “There are many misconceptions out there about [people with records]. We try to look beyond that label and consider each person on his or her merits—on a case-by-case basis.”⁷¹ These policies have also yielded benefits to our economy and society. A 2011 study evaluating the economic benefits of employing formerly incarcerated people in Philadelphia found that putting 100 formerly incarcerated persons back to work would increase their lifetime earnings by \$ 55 million, increase annual sales tax revenue by \$19,100 and contribute \$770,000 in sales tax revenues over their lifetime.⁷² Additionally, the same study estimated that a reduction in recidivism for 100 individuals can result in savings over \$2 million annually.⁷³

We know that employment can help public safety, and the overall prosperity of communities. Employment promotes public safety and quality of life in neighborhoods. Obtaining reliable employment is critical for formerly incarcerated individuals success and not re-offending.⁷⁴ Other research also points to earning higher wages decreasing the likelihood of recidivism.⁷⁵ A three-year study examining the rate of recidivism of formerly incarcerated

⁶⁷ Press Release, White House Launched the Fair Chance Business Pledge, April 11, 2016, <https://obamawhitehouse.archives.gov/the-press-office/2016/04/11/fact-sheet-white-house-launches-fair-chance-business-pledge>.

⁶⁸ EmployeeScreenIQ, *Employment Screening 2015: Background Screening Trends & Practices* (2015), http://content.employeeescreen.com/hubfs/ESIQ_2015_survey_final2.pdf?t=1446555272215.

⁶⁹ *Id.*

⁷⁰ Christy Visser, Sara Debus, and Jennifer Yahner, *Employment after Prison: A Longitudinal Study of Releases in Three States*, URBAN INSTITUTE (2008), www.urban.org/UploadedPDF/411778_employment_after_prison.pdf.

⁷¹ U.S. Dep’t of Labor, Center for Faith-Based and Community Initiatives, *Ready 4 Work*, https://www.doleta.gov/PRI/PDF/R4W_Business_Perspectives_Ex_offender_reentry.pdf.

⁷² Economic Benefits of Employing Formerly Incarcerated Individuals in Philadelphia, ECONOMY LEAGUE OF GREATER PHILADELPHIA, 2011. <http://economyleague.org/uploads/files/712279713790016867-economic-benefits-of-employing-formerly-incarcerated-full-report.pdf>.

⁷³ *Id.*

⁷⁴ Christy A. Visser et al., *Ex-Offender Employment Programs and Recidivism: A Meta-Analysis*, JOURNAL OF EXPERIMENTAL CRIMINOLOGY 1 (2005): 295–316, https://www.researchgate.net/publication/226757982_Ex-offender_Employment_Programs_and_Recidivism_A_Meta-Analysis.

⁷⁵ *Id.* at 295.

individuals who participated in a program aimed at assisting individuals in finding and keeping gainful employment, found that, among the people who participated in the program and obtained employment, only 18 percent recidivated or less than one in five.⁷⁶ And, even being employed for 30 days reduced the rate of recidivism by over 60 percent.⁷⁷ In testimonies collected by the National Employment Law Project, many employers spoke about how employees with records have been found to be more productive, less likely to leave, and be promoted faster.⁷⁸ Additionally, in the case of the U.S. military, it was found that enlistees with felonies were not more likely to be discharged for negative reasons, and they were even promoted at a higher rate than those with no criminal records.⁷⁹

At LDF, ensuring that those with criminal records are not arbitrarily barred from employment opportunities is a key focus of our employment discrimination work. We continue to have active policy and employment discrimination litigation dockets, including ongoing litigation against the Washington Metropolitan Area Transit Authority challenging its use of an overly broad and unnecessarily punitive criminal background screening policy.⁸⁰ And we regard the EEOC's leadership in this area, including its membership on the Federal Interagency Reentry Council, as just one example of how the Commission continues to carefully and thoughtfully recalibrate its regulatory and enforcement agenda to respond to trends and shifts in employment discrimination.

The eve of the 53rd anniversary of the Civil Rights Act of 1964 provides a timely opportunity to pause and consider the regulatory and enforcement priorities of the EEOC. Undoubtedly, the EEOC should be applauded for the tremendous role it has played in helping to ensure that American workers are not being denied equal opportunity based on race, national origin, sex, age, religion, disability, or any other protected category. But, the EEOC's work is far from over. The Commission must continue its work of developing new and innovative ways to combat unlawful discrimination. As Naomi Earp, who served as Chair of the EEOC under President George W. Bush once remarked: "New times demand new strategies to stay ahead of the curve. These old evils are still around in new forms and [the Commission] intend[s] to act vigorously to eradicate them."⁸¹ Accordingly, we should also take this opportunity to ensure that the EEOC has the resources it needs to continue its critically important work, including systemic enforcement, to make sure that no one in this country is denied equal opportunity and fair treatment in the workplace.

Thank you for the opportunity to testify today. I would be happy to answer any questions.

⁷⁶ Safer Foundation, *Three-Year Recidivism Study 2008* (2008), <http://saferfoundation.org/files/documents/Safer%20Recidivism%20Study%202008%20Summary.pdf>.

⁷⁷ *Id.*

⁷⁸ See National Employment Law Project, *The Business Case* <http://www.nelp.org/content/uploads/Business-Case-Fair-Chance-Employment.pdf>; and National Employment Law Project, *Research Supports Fair-Chance Policies*, <http://www.nelp.org/content/uploads/Fair-Chance-Ban-the-Box-Research.pdf>.

⁷⁹ Jordan Yadoo, *Ex-cons May Outperform You in the Workplace*, BLOOMBERG MARKETS (May 5, 2016), <https://www.bloomberg.com/news/articles/2016-05-05/ex-cons-may-outperform-you-in-the-workplace>.

⁸⁰ See LDF Challenges WMATA's Use of Overly Broad and Punitive Criminal Background Screening Policy. July 30, 2014, <http://www.naacpldf.org/update/ldf-challenges-wmatas-use-overly-broad-and-punitive-criminal-background-screening-policy>.

⁸¹ Press Release, U.S. Equal Employment Opportunity Comm'n, *Naomi C. Earp Takes Office as EEOC Chair* (Sept. 6, 2006), <http://eeoc.gov/eeoc/newsroom/release/9-6-06.cfm>.



Statement of the U.S. Chamber of Commerce

**ON: THE NEED FOR MORE RESPONSIBLE
REGULATORY AND ENFORCEMENT POLICIES AT
THE EEOC**

**TO: THE UNITED STATES HOUSE OF
REPRESENTATIVES
COMMITTEE ON EDUCATION AND THE
WORKFORCE
SUBCOMMITTEE ON WORKFORCE PROTECTIONS**

**BY: CAMILLE A. OLSON
CHAIRPERSON
EQUAL EMPLOYMENT OPPORTUNITY
SUBCOMMITTEE
U. S. CHAMBER OF COMMERCE
PARTNER
SEYFARTH SHAW LLP**

DATE: MAY 23, 2017

1615 H Street NW | Washington, DC | 20062

The Chamber's mission is to advance human progress through an economic,
Political and social system based on individual freedom,
Incentive, initiative, opportunity and responsibility.

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.

More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Chairman BYRNE. Thank you, Mr. Cox. Ms. Olson, you are recognized for five minutes.

TESTIMONY OF CAMILLE A. OLSON, PARTNER, SEYFARTH SHAW LLP, WASHINGTON, D.C., ON BEHALF OF THE U.S. CHAMBER OF COMMERCE

Ms. OLSON. Good morning. Thank you, Chairman Byrne, Ranking Member Takano, and other members of the subcommittee. My name is Camille Olson, and I'm testifying on behalf of the U.S. Chamber of Commerce, the world's largest business federation.

I chair the Chamber's Equal Employment Opportunity Policy Subcommittee, and I'm also a partner with the law firm of Seyfarth Shaw, where I'm an active employment litigator.

The Chamber is a long-standing supporter of reasonable and necessary steps to achieve the goal of equal employment opportunity for all. Over the years, the EEOC has taken positive steps toward that mission. However, the EEOC's track record since 2013 raises concerns that any positive developments have stalled.

I will address three issues—the EEOC's investigation and direct party litigation amicus failures, improper guidance documents issued by the EEOC, and the misguided focus of the revised EEO-1 Report.

First, the EEOC has not fulfilled its mandate to investigate charges with efficiency and timeliness. In 2009, the Senate HELP Committee characterized the EEOC's backlog as unacceptable. Yet, in 2016, the Inspector General again stressed the need to improve charge processing, noting there had been no fundamental improvements in this area.

While there has been an overall decline in the backlog over the last eight years, since 2013, the EEOC's charge backlog has actually increased 3.9 percent.

In addition, the EEOC's continuing emphasis on systemic cases has led to a drastic decline in both the volume as well as the quality of its litigation. The EEOC's focus on increasing the percentage of systemic cases incentivized the agency to take aggressive approaches when evaluating charges at the expense of targeted investigations and prompt resolutions of individual charges of discrimination.

Individuals who file charges do not want press releases. They want a fair, timely examination of their complaint, and if appropriate, a remedy. Indeed, we have seen a significant decline in the number of merit suits filed. If you look between 2001 and 2011, the EEOC filed between 250 and 388 merit suits each and every year. In striking contrast, the EEOC's General Counsel's Office filed only 86 lawsuits in 2016.

Against this backdrop, lawsuits brought by the EEOC have been judged to be frivolous, unreasonable, and without foundation, resulting in significant attorney fees awarded against the EEOC.

The Sixth Circuit criticized the EEOC in one case for "playing a hand it just could not win." Sanctions against the EEOC have focused on its failure to conduct proper discovery and for bringing meritless cases.

Similarly, the EEOC's amicus program has resulted in numerous defeats in recent years. This is a waste of resources and causes the agency to also lose credibility with the judiciary.

Second, the EEOC's track record issuing guidance demonstrates the agency's improper attempts to establish new legal standards through these guidance enforcement documents. In one case, the Supreme Court characterized the EEOC's underlying enforcement guidance as "a proposed standard of remarkable ambiguity."

Third, in 2016, the EEOC significantly expanded the EEO-1 Form to collect for the very first time W-2 and hours worked information from employers across the country. Surprisingly, submitted under the *Paperwork Reduction Act*.

While the Chamber strongly supports equal pay for equal work, the revised EEO-1 Form will not promote equal pay because the data being collected in that form at enormous cost is useless for that purpose.

As an initial matter, the new EEO-1 Form is a massive expansion of the current form, which has been in use for decades. The form has been expanded, as noted earlier today, from less than 200 data points to over 3,000, and will force hundreds of millions of dollars in recordkeeping compliance costs alone upon employers.

Also, the EEOC itself has admitted the revised EEO-1 will have no probative value in identifying discriminatory pay practices. That is because a fundamental principle under the Equal Pay Act as well as Title VII is that pay comparisons can only be made between employees who perform equal work or who are similarly situated to each other.

The EEO-1 Report does the opposite and combines vastly dissimilar jobs. In addition, the data ignores legitimate explanations of pay differences, such as experience, employee work performance, and education levels.

Finally, in addition to the significant increased burden of producing the data is the EEOC's inability to show how this sensitive data will be effectively protected from improper use or hacking by others, all of which means the revised EEO-1 Form is a substantial new recordkeeping obligation that will in fact do nothing to ensure equal pay for substantially equal work while at the same time siphoning employer resources from actively performing meaningful compensation audits, and—

Chairman BYRNE. Ms. Olson, I am going to have to ask you to wrap up as quickly as you can.

Ms. OLSON. And then acting upon those results.

I have submitted with the written testimony analytical data and charts providing additional detail on the EEOC's unreasonable enforcement efforts and misplaced priorities.

On behalf of the U.S. Chamber of Commerce, thank you for the opportunity to share some of these concerns with you today.

[The statement of Ms. Olson follows:]

TESTIMONY OF CAMILLE A. OLSON
BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON EDUCATION AND THE WORKFORCE
SUBCOMMITTEE ON WORKFORCE PROTECTIONS
THE NEED FOR MORE RESPONSIBLE REGULATORY AND ENFORCEMENT
POLICIES AT THE EEOC

MAY 23, 2017

Good morning Mr. Chairman and members of the Subcommittee. On behalf of the United States Chamber of Commerce, I am pleased to provide testimony of stakeholder concerns regarding the need for more responsible regulatory and enforcement practices and policies at the Equal Employment Opportunity Commission's ("EEOC" or "Agency"). The EEOC is a vital Agency, but it has misplaced certain priorities, choosing to pursue an expansive, legislative-like agenda through far reaching guidance and novel litigation theories that seek to stretch the bounds of the laws it is charged with enforcing.

This testimony addresses: flaws in the EEOC's investigation and direct party litigation and *amicus* programs; the misguided focus and serious deficiencies contained within the EEOC Revised EEO-1 Report; and EEOC Guidance documents (which have at times been issued without an opportunity for public comment and also included guidance untethered to existing statutes). Many of these issues tend to be interrelated.¹

I begin by acknowledging the very important role the EEOC plays in the shaping of equal employment opportunity practices and policies in the workplace. We know well how important the economy and jobs are to the well-being of our society. The Chamber echoes the sentiments

¹ I am Chair of the Chamber's equal employment opportunity policy subcommittee. I am also a partner with the law firm of Seyfarth Shaw LLP, where I chair the Labor and Employment Department's Complex Discrimination Litigation Practice Group. In addition to my litigation practice, which has specialized in representing local and national employers in federal court litigation involving claims of employment discrimination, I also represent employers in designing, reviewing, and evaluating their employment practices to ensure compliance with federal and local equal employment opportunity laws. I have also represented business and human resource organizations as *amicus curiae* in landmark employment cases, including *Wal-Mart v. Dukes, et al.*, 131 S. Ct. 2541 (2011). Over the last decade I am grateful to have been recognized by my peers as one of the most influential human resource attorneys in the United States as documented by Human Resource Executive, Chambers USA, Illinois Super Lawyers, and Who's Who Legal who have cited by role in guiding employers through complex and evolving laws. I had the privilege of receiving, along with my colleagues, the Financial Times' 2016 Award for Innovation in Collaboration.

I would like to acknowledge Seyfarth Shaw LLP attorneys Richard B. Lapp, Annette Tyman, and Michael Childers, as well as Jae S. Um, Korin T. Isotalo, and Billy Johnson for their invaluable assistance in the preparation of this testimony.

of Acting EEOC Chair Vicki Lipnic, who recently described the EEOC's mission as consistent with the current Administration's focus on "jobs, jobs, jobs" in that the *name* of the Agency — the Equal Employment Opportunity Commission — necessarily invokes the concept of "Opportunity" for both employees and employers.

Certainly, the EEOC has the critical role of ensuring that employment practices are conducted without regard to protected characteristics. The laws the EEOC enforces are designed to ensure that all have equal access to the benefits, terms and conditions of employment.² Over the years, the EEOC has taken positive steps toward that mission. In FY 2016, the EEOC secured nearly \$350 million in monetary relief through mediation, conciliation and settlement, representing tangible relief for thousands of complainants. Since 2008, the EEOC has made a concerted effort to address its backlog of unresolved cases and, in the period from 2010 to 2013, the EEOC demonstrated progress in reducing the charge backlog from its peak of 86,338 in 2010 to 73,508 as of the end of FY2016. However, the EEOC's track record from 2013 forward raises concerns that these positive developments have stalled as a result of misplaced priorities and incentives.

In the past 5 years since the approval of the current Strategic Plan in early 2012, the EEOC has increasingly embraced an enforcement and policy philosophy that emphasizes headline-grabbing systemic cases. This emphasis on novel theories and expansive litigation tactics has led the EEOC astray from its core mission. Unfortunately, the EEOC's recent record demonstrates misalignment of its priorities to its fundamental mission, with adverse effects on its overall efficacy and performance of its prime function.

With respect to the formulation of Guidance for employers, the EEOC recently has acknowledged the importance of making proposed guidance available for public comment prior to final issuance. Consistent commitment to public comment periods would signal a consistent intent by the EEOC to work collaboratively with its constituents to combat workplace discrimination and would allow interested parties to provide input with respect to the practicality of agency guidance and to note, where appropriate, any inconsistencies between the draft guidance and applicable law. Specifically, the Chamber applauds the EEOC for seeking public comments on its Proposed Enforcement Guidance on Unlawful Harassment Discrimination, and welcomes the instructive checklists and best practices the EEOC offered to the employer community as suggestions to consider in determining how best to provide harassment-free workplaces, taking into consideration their individual and unique circumstances. Given the important role the EEOC's Guidance plays in assisting employers in complying with the law, this is a very positive step toward enhancing the usefulness of the EEOC's work.

Despite these successes, the EEOC seems to have lost focus in favor of an enforcement and policy philosophy which appears to be driven by its desire to emphasize novel theories and

² Congress established the EEOC to prevent unlawful employment practices by employers. The EEOC enforces Title VII of the Civil Rights Act of 1964 ("Title VII"), the Americans with Disabilities Act ("ADA"), the Equal Pay Act ("EPA"), the Genetic Information Nondiscrimination Act ("GINA"), and the Age Discrimination in Employment Act of 1967 ("ADEA"), among other federal employment discrimination laws.

expansive litigation techniques which detracts from its important agenda. This approach delays the resolutions of non-meritorious back-logged charges as well as the conciliation, mediation and, as a last resort, litigation of meritorious allegations of discrimination under existing equal employment opportunity laws.

More recently the EEOC has moved from an Agency designed to ensure “Equal Employment Opportunity” to an Agency that is engaged in (1) inappropriate efforts to expand existing policy beyond the law, (2) imposing burdensome new requirements on employers that do not serve a meaningful purpose or find a basis in statute, (3) ineffective and untimely investigations, and (4) unmeritorious and costly direct litigation.

In 2014, I provided testimony before this Subcommittee that included the Chamber’s Paper entitled: “A Review of Enforcement and Litigation Strategy During the Obama Administration - A Misuse of Authority” (June 2014) (“Chamber’s EEOC Enforcement Paper”).³ The Chamber’s EEOC Enforcement Paper detailed the unreasonable enforcement efforts by the EEOC during the Obama Administration as documented in federal court decisions and as conveyed to the Chamber by its members. The analysis demonstrated that the EEOC’s litigation priorities included: pursuing investigations and settlements despite clear evidence that the alleged adverse action was not discriminatory and pursuing litigation described by federal court judges as frivolous, unreasonable and without foundation. In addition, the Chamber’s analysis of 2013 court cases revealed the EEOC’s focus on advancing novel, dubious legal theories well beyond accepted legal norms in both its enforcement guidance and *amicus* litigation program.

My testimony today concludes that the issues described in my 2014 testimony and identified in the Chamber’s EEOC Enforcement Paper continued to persist through the end of the prior Administration. Further, these issues raise fundamental questions about the effectiveness of the Performance Measures articulated in the EEOC’s Strategic Plan (FY 2012 - 2016). Since the implementation of its plan, the EEOC’s investigation and litigation record shows a material decline in both the volume of cases and the monetary relief secured for injured parties.

In the EEOC’s 2016 Performance and Accountability Report dated November 15, 2016, the Office of the Inspector General noted that the EEOC needed to “make major improvements in mission critical areas,” and identified the development of a new strategic plan as a “significant challenge.”⁴ The Inspector General further noted a need for the Agency to ensure that the plan contains “meaningful goals” as well as “outcome-based” performance measures in its next strategic plan.⁵ For these reasons, it is critical that the EEOC realign its strategic direction in a manner that is consistent with the authority and role afforded to the Agency. Emphasis should

³ I request that the Subcommittee accept my written testimony as part of the written record of today’s Hearing.

⁴ 2016 Performance and Accountability Report available at, <https://www.eeoc.gov/eeoc/plan/upload/2016par.pdf> (p. 54)

⁵ 2016 Performance and Accountability Report.

be placed on the urgency of these needs, given that the EEOC is due to submit a draft of its 2018-2022 Strategic Plan to the Office of Management and Budget (“OMB”) on June 2, 2017.

I. THE EEOC’S INVESTIGATION AND LITIGATION RECORD

A. EEOC Investigations

The EEOC appears unwilling to focus investigations on the charges actually before it. Rather, the Commission has too often treated charges as an opportunity for broad and expansive inquiries into issues unrelated to the actual charge. The Agency’s focus on systemic litigation cases seems to be the guiding principle of the EEOC’s enforcement efforts.

The Supreme Court previously admonished the EEOC to refrain from expanding its investigations beyond the reasonable scope of the charge.⁶ Cases following *Shell Oil* have held that the EEOC, no matter how it might try, cannot escape the requirement to show a nexus between the charge and its investigation.⁷

For instance in *EEOC v. Konica Minolta Business Solutions, USA, Inc.*, the Seventh Circuit admonished the EEOC that it must show that it has a “‘realistic expectation rather than an idle hope’ that the information requested will advance its investigation.”⁸ And most recently in *EEOC v. TriCore Reference Laboratories*, the Tenth Circuit rejected an overly broad subpoena request in an ADA case because the “EEOC’s real intent in requesting this [information was], in fact, difficult to pin down.”⁹ The EEOC appears to have been on a quest to either expand the scope of the allegations before it, or convert a potentially legitimate individual charge into a large “systemic” level matter. The EEOC has not sought to more efficiently and impactfully enforce the laws through a well-developed individual case, instead searching for ways to bring expanded, lengthy “systemic” cases with all of the attendant procedural and litigation difficulties.

Under the 2012-2016 Strategic Plan, the EEOC has consistently prioritized its pursuit of large-scale litigation and settlements, at the expense of the tens of thousands of individuals whose charges are relegated to the backlog.

In previous Strategic Plans, the EEOC utilized outcome-based performance measures including (1) the percentage of charges resolved in 180 days or fewer, (2) the percentage of investigative files meeting established criteria for quality, and (3) the number of individuals benefiting from the EEOC’s enforcement programs for each Agency FTE (full-time equivalent)

⁶ *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984).

⁷ *McLane Co., Inc. v. EEOC*, 137 S.Ct. 1159, 1165 (2017) (citing *University of Pennsylvania v. EEOC*, 493 U.S. 182, 191 (1990)).

⁸ *EEOC v. Konica Minolta Business Solutions U.S.A., Inc.*, 639 F.3d 366, 369 (7th Cir. 2011) (quoting *EEOC v. United Air Lines, Inc.*, 287 F.3d 643, 653 (7th Cir. 2002)).

⁹ *EEOC v. TriCore Reference Laboratories*, 849 F.3d 929, 937 (10th Cir. 2017).

employee.¹⁰ In contrast, the EEOC's Strategic Plan (FY 2012 - 2016) replaced the quantitative, outcome-based measures in favor of certain "process" measures.¹¹ For instance, the practice of reporting the percentage of charges resolved within 180 days was discontinued under the current plan.

As the adage goes, what gets measured gets managed, and the EEOC's performance metrics essentially implemented incentives that both reflect and further promote its misaligned priorities. Indeed, the Urban Institute raised concerns with the EEOC's 2012-2016 Strategic Plan metric that evaluates the EEOC's performance, in part, on whether a target percentage of all active cases on the EEOC's litigation docket are "systemic" cases.¹² Among other issues, the Urban Institute noted that this measurement "could encourage excessive litigation on charges that might not otherwise be considered systemic or, or it could lead to failure to pursue sufficient "non-systemic" charges. The Urban Institute's concerns have become reality. Indeed, this approach provides an incentive for the EEOC to look for "systemic cases" behind every factual setting while adversely impacting the overall number of active cases on the docket.

Undoubtedly, this shift away from quantitative measures has been a factor in the EEOC's performance under the 2012-2016 Strategic Plan. As indicated in Figure 1, while the rate of charge resolutions increased steadily between 2006 to 2011, since 2012 there has been a general decline in the rate of resolved charges. Specifically, while the Agency reported a decline in the backlog of charges in FY2016 as compared to FY2015, in the past four years, the charge backlog in the private sector has *increased* by approximately 3.9%.¹³

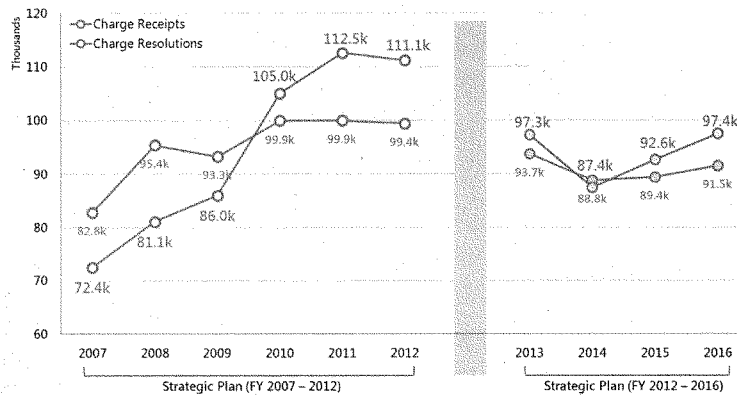
¹⁰ See EEOC Strategic Plan for FY 2007 - 2012, available at https://www.eeoc.gov/eeoc/plan/strategic_plan_07to12_mod.cfm

¹¹ EEOC Strategic Plan for FY 2012 - 2016, available at https://www.eeoc.gov/eeoc/plan/upload/strategic_plan_12to16.pdf

¹² Urban Institute Evaluation of EEOC Performance Measures, available at https://www.eeoc.gov/eeoc/oig/performance_measures.cfm

¹³ EEOC Performance and Accountability Report for FY 2016, available at <https://www.eeoc.gov/eeoc/plan/upload/2016par.pdf>. See statements at p. 12 regarding 2015 to 2016 filings with Inspector General's statements at p. 55 relating to the recent history of the charge inventory: "[t]he inventory data show that the inventory increased 3.9% over the last four years. The inventory increased by less than 1 percent in fiscal year 2013, to 70,781. In fiscal year 2014, it increased 6.9 percent, to 75,658. In fiscal year 2015, inventory increased 1.4 percent, to 76,408. In fiscal year 2016, inventory decreased 3.7% to 73,559 (agency estimate)."

Figure 1. Charge Receipts and Resolutions by Year, 2007 - 2016
Source: EEOC Enforcement & Litigation Statistics



Although budget pressure remains a factor, an analysis of total dollars spent on charge processing against the number of resolutions achieved shows a troubling decline in the EEOC's cost controls and efficiency measurements, raising questions with respect to the Agency's resource allocation and utilization decisions. On a per-charge basis, costs increased 31% from \$1,619 in 2011 to \$2,121 in 2015.¹⁴ Over the years, the EEOC has cited budgetary constraints as a key limitation on its ability to manage the backlog, but the significant increase in costs per charge suggests that the Agency is failing to leverage the budget it has been given.

An analysis of total dollars attributed to administrative charge processing as a percentage of monetary benefits also suggests that the Agency's efforts have been less effective as well as less efficient. In 2011, the EEOC reported roughly \$182 million as the costs allocated to administrative charge processing, and that figure represented 50% of monetary benefits

¹⁴ These figures were calculated based on the number of charge resolutions and monetary relief amounts reported by the EEOC in its Enforcement & Litigation Statistics as well as actual budget figures reported by the EEOC as allocated to administrative charge processing on its annual Congressional Budget Justifications from 2011 to 2017). The charge statistics are available at <https://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm>; EEOC's Congressional Budget Justifications for current and past years are available at <https://www.eeoc.gov/eeoc/plan/index.cfm>

recovered through those efforts.¹⁵ This figure rose to 68% in 2014 and 55% in 2015; particularly when compared to the range of 49% to 51% in 2011, 2012, and 2013, this analysis suggests that, despite the *increase* in its cost per charge, the EEOC is becoming *less successful or efficient* in leveraging its costs to secure monetary benefits and relief for charging parties.

In short, the available data produced by the EEOC demonstrates that its administrative charge resolution process continues to leave a backlog which represents the “many people who are waiting for some investigation, resolution, and assistance with a claim.”¹⁶

In the 2016 Performance and Accountability Report (“2016 PAR”), the Inspector General noted that “in previous [years], we have encouraged EEOC to develop new methods for improving its resolution of charges of discrimination. EEOC has made no fundamental improvements in this area since the implementation of Priority Charge Handling Process (“PCHP”) in 1995.” The EEOC must focus on and drive measurable improvements in timeliness, quality and volume of charges processed.

¹⁵ *Id.* Cost allocations to specific programs are detailed within the Congressional Budget Requests for each Fiscal Year. Monetary benefits recovered through the administrative charge process are reported in the EEOC’s Litigation and Enforcement Statistics. Data from all relevant years were compiled from each of these sources:

	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015
Administrative Charge Processing Program Cost as Reported to Congress	\$182.2m	\$187.7m	\$183.1m	\$200.9m	\$196.5m
Charge Resolutions	112,499	111,139	97,252	87,442	92,641
Cost per Charge Resolution	\$1,619	\$1,689	\$1,883	\$2,297	\$2,121
Monetary Benefits from Charge Resolution	\$364.7m	\$365.4m	\$372.1m	\$296.1m	\$356.6m
Charge Processing Cost as (%) of Benefits	50%	51%	49%	68%	55%

¹⁶ Senate HELP Committee Hearing Transcript, November 19, 2009, available at <https://www.gpo.gov/fdsys/pkg/CHRG-111shrg75510/html/CHRG-111shrg75510.htm> (see former Chair Berrien testimony that the term “backlog” referred to the “many people who are waiting for some investigation, resolution, and assistance with a claim”).

B. The EEOC's Litigation Record

1. EEOC Initiated Lawsuits Are In Decline

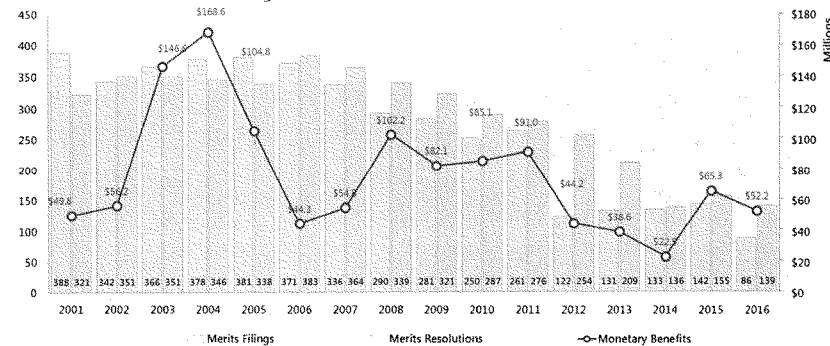
As noted earlier, the Chamber's EEOC Enforcement Paper published in June 2014 revealed a record of ineffectiveness of the EEOC's litigation program. Specifically, the EEOC's litigation docket declined dramatically during the period since 2011. The decline in litigation filings highlighted in the Chamber's 2014 report has deteriorated further.

In 2016, the General Counsel's office filed only 86 lawsuits compared to the 142 lawsuits filed in 2015. Recoveries from lawsuits were similarly down from \$52 million compared to \$65 million. The active docket at the end of 2016 totaled 165 cases as opposed to 218 cases in 2015.

A historical analysis of the EEOC's litigation track record illustrates the misalignment of priorities plaguing its investigation processes, but perhaps to an even greater extent. Over the past 15 years, the drastic decline in the number of cases filed and resolved demonstrates a troubling willingness by the EEOC to make bigger bets on fewer cases. Moreover, while some fluctuation of monetary benefits recovered from year to year is to be expected, the general downward trend in recovered benefits does little to show a net positive impact as a result of the EEOC's focus on systemic litigation. While the Chamber does not encourage litigation for the sake of litigation or increasing the reported number of cases to simply present a better picture of activity, it does believe that appropriate, targeted litigation where the facts warrant litigation as a last avenue to resolving meritorious allegations of discrimination, represents appropriate enforcement of the non-discrimination laws.

Figure 2. EEOC Merits Litigation Filings, Resolutions and Monetary Benefits by Year, 2001 - 2016

Source: EEOC Enforcement & Litigation Statistics



Historical analysis of costs associated with private sector litigation against the EEOC's litigation outcomes and overall workload (ongoing cases from prior years plus the number of new filings) reflects poorly on the EEOC's priorities and resource allocation. The per-case cost

of litigation has increased 80% from \$113,398 in 2011 to \$279,561 in 2016.¹⁷ In 2011, the total costs attributed to private sector litigation amounted to 87% of monetary benefits recovered. Indeed, in *every year* since 2012, the costs associated with litigation have exceeded the monetary benefits recovered.¹⁸

2. Courts Are Ordering Significant Fees Against the EEOC For Unfounded Litigation

Against the backdrop of declining EEOC-initiated lawsuits, in a number of cases the Agency has conducted litigation in a manner resulting in significant fee awards *against* it. Those are astounding results when one considers that the Supreme Court has determined that courts may award fees to a prevailing defendant in civil rights claims *only* in instances when the plaintiff's allegations are "frivolous, unreasonable, or without foundations."¹⁹

For instance, in *EEOC v. CRST Van Expedited, Inc.*, pending before the district court is the Defendant's renewed motion for \$4.7 million in attorneys' fees following the Supreme Court's remand which reinstated the order granting summary judgement against the EEOC.²⁰ Likewise, in *EEOC v. CVS Pharmacy, Inc.*, the court awarded CVS attorney's fees of over \$300,000 in a case in which the EEOC challenged the use of standard terms in an employee separation agreement.²¹

In *EEOC v. Freeman*, the district court granted the defendant's motion for summary judgment and awarded \$1 million in fees and costs against the EEOC. First, the court reasoned that the EEOC's case relied on statistical analysis from its expert which contained a "mind-boggling number of errors" which "render[ed] his disparate impact conclusions worthless."²² The Fourth Circuit affirmed that, and in a concurring opinion one of the judges on the panel noted, "[t]he Commission's conduct in this case suggests that its exercise of vigilance has been lacking.

¹⁷ EEOC Performance and Accountability Reports, available at <https://www.eeoc.gov/eeoc/plan/archives/annualreports/index.cfm> ,

¹⁸ *Id.* Costs attributed to private sector litigation were taken from the Financial Statements of the annual Performance and Accountability Reports.

¹⁹ See e.g., *Fox v. Vice*, 563 U.S. 826, 833 (2011); *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978).

²⁰ See *EEOC v. CRST Van Expedited, Inc.*, No. 07-CV-95-LRR (N.D. Iowa); *CRST Van Expedited, Inc. v. EEOC*, 136 S.Ct. 1642, 1649 (2016).

²¹ *EEOC v. CVS Pharmacy, Inc.*, 70 F.Supp.3d 937 (N.D. Ill. 2014); *EEOC v. CVS Pharmacy, Inc.*, 809 F.3d 335, 343 (7th Cir. 2015).

²² *EEOC v. Freeman*, 961 F.Supp.2d 783, 796 (D. Md. 2013).

It would serve the Agency well in the future to reconsider how it might better discharge the responsibilities delegated to it or face the consequences of failing to do so.”²³

The Sixth Circuit reached a similar decision in *EEOC v. Peoplemark, Inc.* in which it affirmed an award of over \$750,000 in fees against the EEOC.²⁴ In *Peoplemark*, the Commission had commenced litigation based on a statement by the company’s Associate General Counsel that the company had a blanket policy of rejecting applicants with a felony record. During its investigation, the Commission received documents proving that no such policy existed; however, the Commission continued to litigate the case for over two years before agreeing to a voluntary dismissal with prejudice. In affirming the district court’s decision, the Sixth Circuit noted that upon discovery that the prior statements “belied the facts, the Commission should have reassessed its claim” and that in failing to do so the EEOC had unreasonably continued to litigate a claim “based on a companywide policy that did not exist.”²⁵

Below we summarize a sample of recent decisions in which courts have assessed and/or are reviewing attorneys’ fees and costs sanctions against the EEOC. The costs to taxpayers based on the EEOC’s misguided litigation tactics is staggering.

Figure 3. Examples of EEOC Litigation Abuses

Source: EEOC Enforcement & Litigation Statistics & Case Filings

Case	Dismissed with Sanctions	Court’s Criticism
EEOC v. Tricore Reference Laboratories	\$140,000	EEOC’s claims were “frivolous, unreasonable and without foundation.”
EEOC v. Peoplemark, Inc.	\$751,942	“...the complaint turned out to be without foundation from the beginning.”
EEOC v. Freeman, Inc.	\$938,771	“Because the EEOC insisted on playing a hand it could not win, it is liable for Freeman’s reasonable attorneys’ fees.”
EEOC v. CVS Pharmacy	\$307,902	“The EEOC failed to comply with its enabling act and its regulations, and a fee award is appropriate.”
EEOC v. CRST Van Expedited, Inc.	\$4,700,000 Sanction Motion Pending	“The EEOC’s litigation strategy was untenable.”

²³ *EEOC v. Freeman*, 778 F.3d 463, 472-73 (4th Cir. 2015) (Agee, J., concurring).

²⁴ *EEOC v. Peoplemark, Inc.*, 732 F.3d 584, 587 (6th Cir. 2013).

²⁵ *Id.*, at 592.

II. THE EEOC'S *AMICUS* PROGRAM

The EEOC's litigation record, when it has acted as an *amicus curiae* in litigation initiated by other parties, has similarly resulted in numerous defeats in recent years. The *amicus curiae* program allows the Agency to weigh in on cases that "raise novel or important issues of law" or that present a "particularly important issue that falls within the EEOC's expertise."²⁶

In 2013, the EEOC's *amicus* program was a complete failure – not only were the EEOC's *amicus* positions rejected, the United States Supreme Court and the Courts of Appeals also rejected relevant provisions in the EEOC's underlying Enforcement Guidance documents, compliance manual positions, and policy statements under Title VII and the ADA. The courts' rejection of the EEOC's underlying regulatory guidance left employers searching as to where to find accurate, reliable guidance on their legal obligations under federal non-discrimination laws. See Chamber's EEOC Enforcement Paper at 18-25.

Most recently, between 2014 and April of 2017, the EEOC filed ninety-seven (97) *amicus* briefs.²⁷ One of these briefs was filed with the U.S. Supreme Court, eighty-three were filed in twelve Circuit Courts of Appeals, twelve were filed with various U.S. District Courts, and one was filed with the National Labor Relations Board ("NLRB"). In 2015, the EEOC filed briefs as *amicus curiae* in 22 cases in ten Circuit Courts of Appeals. One of these cases is still pending a decision,²⁸ one was decided on separate grounds than were argued in the EEOC's *amicus* brief,²⁹ and three others ended in a stipulated dismissal.³⁰ The EEOC's track-record on the remaining seventeen cases is mixed, with the Courts of Appeals siding against the Commission in seven cases.³¹ In two cases, the courts' opinions explicitly rejected the position

²⁶ U.S. Equal Employment Opportunity Commission, *Amicus Curiae Program*, (May 12, 2017), available at <https://www.eeoc.gov/eeoc/litigation/amicus.cfm>

²⁷ See U.S. Equal Employment Opportunity Commission, *Amicus Curiae Program*, (May 12, 2017), available at <https://www1.eeoc.gov/eeoc/litigation/briefs.cfm> and the U.S. Department of Justice, Office of the Solicitor General, *Supreme Court Briefs*, (May 12, 2017), available at <https://www.justice.gov/osg/supreme-court-briefs>

²⁸ *Guido v. Mt. Lemmon Fire Dist.*, 0:15-cv-15030 (9th Cir. 2016).

²⁹ *Woods v. FacilitySource, LLC*, 640 Fed.Appx. 478 (6th Cir. 2016).

³⁰ *Cooper v. United Air Lines, Inc.*, No. 15-15623 (9th Cir. 2017); *Cervantes v. Cemex, Inc.*, 14-17437 (9th Cir. 2016); *Eure v. Sage Corp.*, No. 14-51311 (5th Cir. 2015).

³¹ *DeWitt v. Southwestern Bell Telephone Co.*, 845 F.3d 1299, 1316-17 (10th Cir. 2017); *Kovaco v. Rockbestos-Surprenant Cable Corp.*, 834 F.3d 128 (2d Cir. 2016); *Dunaway v. MPCC Corporation*, 669 Fed. Appx. 21 (2d Cir. 2016); *Wade v. The New York City Dept of Education*, 667 Fed.Appx. 311 (2d Cir. 2016); *Morriss v. BNSF Railway Co.*, 817 F.3d 1104 (8th Cir. 2016); *Villarreal v. R.J. Reynolds Co., et al*, 839 F.3d 958 (11th Cir. 2016); *Brandon v. Sage Corp.*, 808 F.3d 266 (5th Cir. 2015).

taken by the EEOC's brief.³² The EEOC had successes in ten cases where a Court of Appeals issued a ruling consistent with the EEOC's *amicus* position. However, only two³³ of the ten decisions explicitly referenced the EEOC's *amicus* position, while the other eight³⁴ made no mention of the EEOC's position or *amicus* filing. Thus, the EEOC's successes must be viewed in the context of the resources expended in furtherance of the *amicus* program.

In the sole *amicus* brief filed by the EEOC with the Supreme Court during this period, the Supreme Court rejected the EEOC's position. In *Young v. United Parcel Service, Inc.*, the EEOC sought to apply its guidance that:

[a]n employer may not refuse to treat a pregnant worker the same as other employees who are similar in their ability or inability to work by relying on a policy that makes distinctions based on the source of an employee's limitations (e.g., a policy of providing light duty only to workers injured on the job).³⁵

The Supreme Court declined to give deference to the EEOC's guidance in part, because it had been issued after the Court had granted *certiorari* and in part because the Court determined a lack of "'consistency' and 'thoroughness' of 'consideration' in the Guidance. The majority also noted that the EEOC's position was inconsistent with both the Court's prior precedent and with the position taken by the government in prior cases, explaining:

In these circumstances, it is fair to say that the EEOC's current guidelines take a position about which the EEOC's previous

³² *DeWitt*, 845 F.3d at 1316-17 (10th Cir. 2017) (rejecting the EEOC's argument "that an employer is [not] categorically free to terminate any and all disabled employees *at the first instance* of any and all disability-related performance deficiencies." (emphasis in original)); *Wade*, 667 Fed. Appx. at 313 (2d Cir. 2016) (finding EEOC's *amicus* position regarding the plaintiff's disability as immaterial to the decision regarding the motivating factors for the termination decision).

³³ *Daniel v. T&M Protection Resources, LLC*, 15-560-cv, 2017 WL 1476598 (2d Cir. Apr. 25, 2017); *Tate v. SCR Medical Transportation Inc.*, 809 F.3d 343 (7th Cir. 2015).

³⁴ *Anderson v. CRST International*, No. 15-55556, 2017 WL 1101101 (9th Cir. Mar. 24, 2017); *Connelly v. Lane Construction Corp.*, 809 F.3d 780 (3d Cir. 2016); *Stephenson v. Pfizer, Inc.*, 641 Fed.Appx. 214 (4th Cir. 2016); *Guessous v. Fairview Property Investments*, 828 F.3d 208 (4th Cir. 2016); *Nesbitt v. FCNH*, 811 F.3d 371 (10th Cir. 2016); *Kilgore v. Trussville Development, LLC*, 646 Fed.Appx. 765 (11th Cir. 2016); *Savage v. Secure First Credit Union*, No. 15-12704, 2016 WL 2997171 (11th Cir. May 25, 2016); *Rosenfield v. GlobalTranz Enterprises*, 811 F.3d 282 (9th Cir. 2015).

³⁵ *Young v. United Parcel Service, Inc.*, 135 S.Ct. 1338, 1351 (2016) (internal quotations omitted); see also 2 EEOC Compliance Manual § 626-I(A)(5), p. 626:0009 (July 2014)).

guidelines were silent. And that position is inconsistent with positions for which the Government has long advocated.³⁶

More recently, the Seventh Circuit was unpersuaded by the EEOC's *amicus* arguments in *Carlson v. Christian Brothers Services* regarding what constitutes a "charge" of discrimination for the purpose of determining if a private litigant had exhausted administrative remedies. In *Carlson*, the plaintiff was terminated from her position as a customer service representative roughly a year after she had been injured in a car accident. She filed a complaint with the Illinois Department of Human Rights ("IDHR") alleging disability discrimination. The IDHR has a work-sharing agreement with the EEOC whereby charges filed with the IDHR are cross-filed with the Commission; however, the workshare agreement does not include non-charge complaints which are filed with the IDHR. When Carlson brought a private action under the ADA, her case was dismissed because she had failed to exhaust her administrative remedies by filing a charge with the EEOC.

The Supreme Court had previously weighed in on this issue by holding that in order to be deemed a charge, a filing "must be reasonably construed as a request for the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and the employee."³⁷ Despite this prior guidance, the EEOC's *amicus* filing took the position that filing an administrative complaint in this case was akin to filing a charge.³⁸ In rejecting the EEOC's position, the Seventh Circuit reasoned that in addition to Carlson's complaint form explicitly stating "THIS IS NOT A CHARGE," it also made no request for any remedial action and therefore could not be considered a "charge" in light of the Supreme Court's previous holding.

These decisions demonstrate that the EEOC is expending considerable resources in an *amicus* program that has not had a meaningful impact furthering its mission. Thus, EEOC should return to its role as a neutral enforcer of the law rather than remaining an activist litigant seeking to legislate through the courts.

III. THE EEOC'S EXPANSIVE ENFORCEMENT GUIDANCE

The Chamber is a long-standing supporter of reasonable and necessary steps designed to achieve the goal of equal employment opportunity for all -- including the EEOC's issuance of sub-regulatory enforcement guidance that "express[es] official agency policy and ... explain[s] how the laws and regulations apply to specific workplace situations,"³⁹ *when that Guidance is enacted by notice-and-comment rulemaking, and represents the law, as passed by Congress and interpreted by the Courts*, not the EEOC's expansive view of the law.

³⁶ *Id.*, at 1352.

³⁷ *Federal Exp. Corp. v. Holowecki*, 552 U.S. 389, 402 (2008).

³⁸ *Carlson v. Christian Brothers Services*, 840 F.3d 466, 468 (7th Cir. 2016).

³⁹ See <https://www.eeoc.gov/laws/guidance/>

Such Guidance can protect employees from unlawful discrimination, harassment and retaliatory practices by providing accurate, specific direction to employers in complying with applicable laws that provide general protections to employees (through providing best practice examples regarding training, policy development, and ensuring best practices in employment decision making).⁴⁰ Guidance has the opportunity to serve as an effective ounce of prevention; far preferable than expensive, prolonged pounds of enforcement “litigation cure.”

However, for EEOC Guidance to be accepted and embraced by stakeholders it must accurately and credibly reflect the current state of the law as well as the day-to-day realities of today’s workplace. A solid grounding in the law and understanding of stakeholders’ day-to-day issues in its application is essential for the EEOC to provide reliable guidance attuned to today’s workforce.

Too often, over the past eight years, the EEOC has, instead, issued Guidance adopting substantive policy positions that create compliance requirements without the benefit of public comment.⁴¹ In so doing the EEOC has acted contrary to the strong policy favoring pre-adoption notice and comment on guidance documents. OMB’s “Final Bulletin for Agency Good Guidance Practices” counsels:

Pre-adoption notice-and-comment can be most helpful for significant guidance documents that are particularly complex, novel, consequential, or controversial. Agencies also are encouraged to consider notice-and-comment procedures for interpretive significant guidance documents that effectively would extend the scope of the jurisdiction the agency will exercise, alter the obligations or liabilities of private parties, or modify the terms under which the agency will grant entitlements. As it does for legislative rules, providing pre-adoption opportunity for comment on significant guidance documents can increase the quality of the guidance and provide for greater public confidence in and acceptance of the ultimate agency judgments.⁴²

Over the past eight years, the EEOC has not consistently provided the public with an opportunity to comment on its enforcement guidance. For example, EEOC enforcement guidance related to the use of criminal convictions, pregnancy discrimination, credit background

⁴⁰ For example, the Chamber has urged the EEOC to consider its filed comments with respect to the EEOC’s recently-issued Proposed Harassment Enforcement Guidance so that valuable analysis, instructive checklists, and best practices recommendations contained in the Guidance are not overwhelmed by the three or four critical issues of legal misinterpretation contained in the EEOC’s description of the guidance’s legal underpinnings.

⁴¹ While the EEOC does not have regulatory authority under Title VII, that does not preclude the Agency from seeking public comment to more fully understand the implications to stakeholders.

⁴² Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3438 (Jan. 25, 2007).

checks or other reasonable accommodation requirements under the ADA were not made available for public comment before their issuance.

To illustrate, in April 2012, the EEOC issued Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964. This guidance was not issued for notice and comment pursuant to OMB's Final Bulletin for Agency Good Guidance Practices. The rule contained in this guidance is relatively simple — employers commit race discrimination if they choose to hire applicants without criminal histories over applicants with criminal histories unless the employer conducts a highly subjective individualized assessment of the applicant with a criminal history. If the applicant with a criminal history is excluded after an employer considers these factors, presumptively no race discrimination exists. If the applicant is excluded without an individualized assessment, presumptively race discrimination exists. However, there is no individualized assessment requirement under Title VII.⁴³

The EEOC itself sends mixed signals regarding the efficacy of its guidance positions. For example, in the *Texas v. EEOC* litigation, the EEOC described its guidance documents as “lack[ing] the force of law.”⁴⁴ Yet, only months later, the Solicitor General of the United States asked the Supreme Court not to grant a writ of certiorari in *Young v. United Parcel Service* because the EEOC was about to issue enforcement guidance on the issue (guidance that was then issued before the Supreme Court's decision, and expressly rejected by the Supreme Court).⁴⁵

Note the inherent inconsistency in those positions. Employers are forced to comply with policy positions set forth in enforcement guidance documents,⁴⁶ while the EEOC argues in court

⁴³ Another flaw in this particular EEOC guidance is its treatment of state laws. While Title VII does contain a provision that Title VII supersedes state law only where a state or local law requires or permits an act that would violate Title VII, the EEOC provides no guidance on how an employer should weigh competing federal and state interests, other than to say that an employer will have to establish that a screen based on state law is job-related and consistent with business necessity. It is an expensive endeavor for a nursing home or other health care facility to show that not hiring a serial rapist or drug dealer pursuant to state law is job-related and consistent with business necessity, yet that is what this guidance contemplates.

⁴⁴ See EEOC's Memorandum in Support of Motion to Dismiss, No. 5:13-CV-255 C, 2014 WL 549190, at 8 (N.D. Tex. Jan. 27, 2014).

⁴⁵ Amicus Brief for the United States at 21-22, *Young v. United Parcel Service, Inc.*, No. 12-1226 (May 19, 2014). Notably, the EEOC is not a signatory to that brief, indicating that at least three Commissioners do not with the argument set forth by the Department of Justice.

⁴⁶ One intended audience for any EEOC enforcement guidance is EEOC investigators who are trained to implement the relevant guidance document in their day-to-day investigations. EEOC investigators will determine whether reasonable cause exists that discrimination occurred based on an employer's compliance with the relevant enforcement guidance, essentially equating compliance with the EEOC's guidance document as compliance with a statute. During an investigation, employers are held to the standards set forth in the EEOC's guidance documents.

that those positions have no force of law in Texas, while, at the same time, the Department of Justice requests that the Supreme Court deny granting a writ of certiorari in *Young* because the EEOC's anticipated guidance will resolve the issue.

Most importantly, too often over the past eight years, the EEOC has issued Guidance untethered to enabling legislation and applicable legal precedent resulting in confusion and inconsistency in understanding. When it has done so, it fails in its opportunity and obligation to provide clear, consistent, helpful direction to stakeholders to ensure compliance with equal employment opportunity laws.

As discussed earlier, in *Young*, the Supreme Court declined to rely on the EEOC's reasoning in its Pregnancy Discrimination Act Guidance, "not because of any agency lack of 'experience' or 'informed judgment.' Rather, the difficulties are those of timing, 'consistency,' and 'thoroughness' of 'consideration.'"⁴⁷

Additionally, in the Chamber's EEOC Enforcement Paper, the Chamber cited numerous examples of federal courts declining to defer to the EEOC's guidance documents. For example, in *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (2013), the Supreme Court rejected EEOC's Enforcement Guidance on Vicarious Employer Liability as "a proposed standard of remarkable ambiguity." Similarly, in *Univ. of Texas Southwestern Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013) the Supreme Court again declined to defer to the EEOC's Enforcement Guidance on Recent Developments in Disparate Treatment Theory as it "fail[ed] to address the specific provisions of this statutory scheme, coupled with the generic nature of its discussion of the causation standards for status-based discrimination and retaliation claims, calling the manual's conclusion into serious question."

Most recently, the EEOC issued Proposed Enforcement Guidance on Unlawful Harassment Discrimination ("Harassment Enforcement Guidance") in early January 2017.⁴⁸ The EEOC introduces the Harassment Enforcement Guidance by describing its contents as an explanation of "the legal standards for unlawful harassment and employer liability. ... a single

As many guidance documents take expansive views of rights and obligations under the law, investigators and EEOC attorneys have built large systemic cases on questionable theories that force employers to settle before or in the early stages of litigation, or face expensive, protracted litigation against an opponent with unmatched resources to litigate the legal issues advanced by the EEOC's guidance documents. Those enforcement guidance theories have been rejected in the three instances they have been reviewed by the United States Supreme Court since 2008 and in numerous Appellate Court decisions.

⁴⁷ The Court took particular notice of the fact that the EEOC attempted to change its guidance during the course of the litigation in order to influence the litigation. This represents a clear example of the EEOC attempting to use Guidance not for its intended purpose but rather to use it in a partisan manner to attempt to change the law.

⁴⁸ EEOC, Proposed Enforcement Guidance on Unlawful Harassment (Jan. 10, 2017), available at <https://www.regulations.gov/document?D=EEOC-2016-0009-0001>.

analysis for harassment that applies the same legal principles under all equal employment opportunity statutes embraced by the Commission.”⁴⁹ It “replaces, updates, and consolidates” four EEOC guidance documents on harassment in the workplace issued between 1990 and 1999. The EEOC describes its contents as expressing the uniform interpretations of laws regarding many harassment issues, and the Commission’s considered positions where the interpretations of the law differ across jurisdictions.⁵⁰

To be clear, the Chamber generally supports the purpose of the Harassment Enforcement Guidance, the flexible checklists and best practices offered as suggestions for employers to consider in connection with their efforts to ensure their workplaces are free from unlawful harassment. It should be noted, however, that while the Chamber believes that harassment of individuals on the basis of the protected characteristics under law is a wholly impermissible and abhorrent practice, it is concerned that the EEOC may be using its function of issuing sub-regulatory guidance, which should state the law in a manner understandable to the stakeholders, as a means for changing the law. In not granting the EEOC authority to issue substantive regulations under Title VII — and only recently permitting regulations to be issued under the ADA — Congress made clear that it expected the EEOC to confine itself to charge processing and case prosecution and that it cannot engage in wholesale regulatory interpretation to restate the law.⁵¹ We urge the EEOC to maintain credibility with the courts and its stakeholders by issuing guidance tethered to settled law so as not to undermine its effectiveness.

IV. THE REVISED EEO-1 IMPOSES ONEROUS REQUIREMENTS ON EMPLOYERS THAT WILL SERVE NO PUBLIC BENEFIT

Another example of the EEOC’s misguided focus as an agency can be found in the changes it implemented to the EEO-1, Employer Information Report, in 2016 (described as Component 2), to collect pay and hours worked information from employers on an annual basis.⁵² The EEOC referred to the revisions as “necessary” for the enforcement of Title VII, the EPA and Executive Order 11246.⁵³ Acting Chair Lipnic and then Commissioner Constance Barker both dissented from the Commission’s vote to approve the changes to the EEO-1 Report.

As it currently stands, beginning in 2018, employers will be required to submit W-2 wages and hours worked information in a complicated format that combines race/ethnicity and sex, and organizes the data in 12 arbitrary pay bands within 10 EEO-1 job categories. To provide some context as to the scope of the changes, the current EEO-1 report requires

⁴⁹ Enforcement Guidance at p. 4.

⁵⁰ *See id.*

⁵¹ *See* https://www1.eeoc.gov/eeoc/newsroom/wysk/regulations_guidance_resources.cfm (“Under Title VII of the Civil Rights Act, EEOC’s authority to issue legislative regulations is limited to procedural, record keeping, and reporting matters.”); *see also* 42 USC § 2000ff-10.

⁵² 81 Fed. Reg. 5113 (February 1, 2016); 81 Fed. Reg. 45479 (July 14, 2016).

⁵³ 81 Fed. Reg. 45479, 45481 (July 14, 2016).

employers to submit 180 data points, while the new report will require 3,660 data points for each employer establishment (i.e., locations with more than 50 employees).

The EEOC justified its burdensome requirements by pointing to research and studies rather than closely examining the information that was specifically within its purview -- the charges filed by those individuals who raised specific allegations of pay discrimination. For instance, of the 91,500 charges filed with the EEOC in 2016, only 952 -- or 1.04% -- contained EPA allegations. From 2010 through 2016 less than 1% of all charges filed included an equal pay claim under the EPA.

Likewise, an analysis of Title VII charges that allege *any* kind of wage claim, whether because of alleged disparities in pay or, for example, failure to promote allegations from which pay disparities flow, is also unremarkable when evaluated against the burdensome requirements that the EEOC is imposing on most employers. The following chart demonstrates the year over year trends in pay related claims, even applying the broadest characterization of “pay” claims as reported by the EEOC.

Figure 4. Charge Receipts with Wage Claims under Equal Pay Act and Title VII by Year, 2010 - 2016

Source: EEOC Enforcement & Litigation Statistics

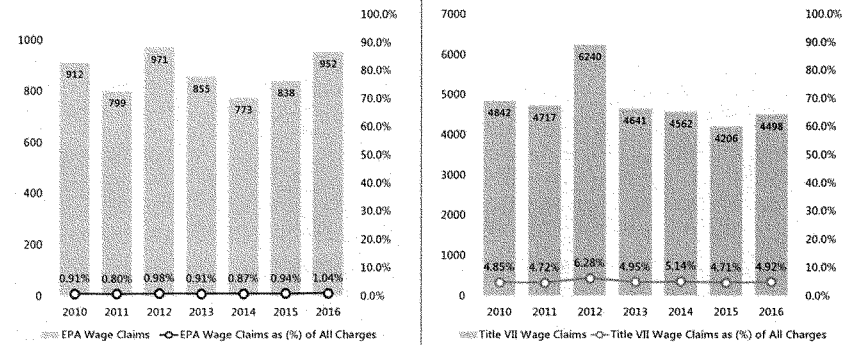
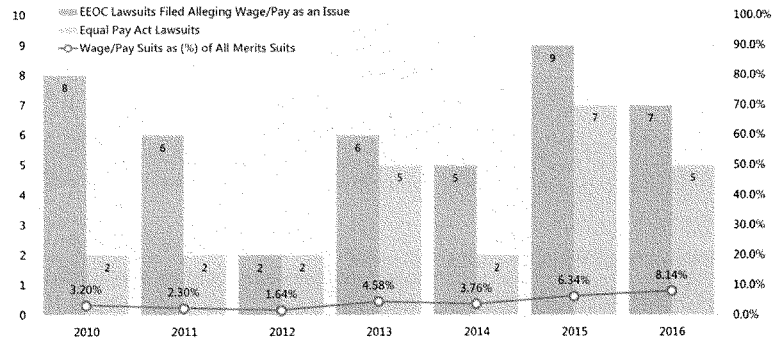


Figure 5. EEOC Lawsuits with Wage and Pay Discrimination Allegations, 2010 - 2016
Source: EEOC Enforcement & Litigation Statistics



Indeed, the EEOC's litigation trend and results with regard to EPA claims highlights the Agency's misguided efforts. Specifically, from 2010 to 2016, the Agency has pursued a total of only 25 EPA lawsuits in all years consecutively. And from 2010 to 2017, the Agency has recovered a total of only \$700,000 in EPA lawsuits. Of course these statistics only paint part of a picture, and certainly significant compliance issues with the Equal Pay Act remain.

Still, this objective data arguably demonstrates that the EEOC is applying an overly broad approach that will serve no public benefit in requiring pay and hours data from employers across the country on an annual basis. A point which is underscored by the Agency's own admission: "The EEOC does not intend or expect that this data will identify specific similarly situated comparators or that it will establish pay discrimination as a legal matter."⁵⁴

In response to the EEOC's proposal submitted under the Paperwork Reduction Act ("PRA"), the Chamber submitted extensive testimony which included detailed information from the employer community regarding the EEOC's flawed burden estimates and expert testimony that described the significant deficiencies with the EEO-1 report for purposes of evaluating whether pay discrimination exists in the workplace.

As set forth in the Chamber's submission to the EEOC, the new reporting requirements are inconsistent with the mandates of the PRA.⁵⁵ Specifically, the PRA requires an issuing agency to: (1) minimize the burden on those required to comply with government requests; (2)

⁵⁴ 81 Fed. Reg. 45479, 45489 (July 13, 2016).

⁵⁵ *Dole v. United Steelworkers of America*, 494 U.S. 26 (1990) (recognizing that the PRA was enacted in response to the federal government's "insatiable appetite for data.").

maximize the utility of the information being sought; and (3) ensure that the information provided is subject to appropriate confidentiality and privacy productions.

The PRA does not create a burden versus benefit analysis, but rather creates an obligation that data collection requests be reviewed in light of their burdens and separately in light of their purported benefits. If the burden associated with a request is too great, no amount of benefit can justify it; similarly, if there is no utility to the data being collected, OMB should not authorize the request no matter how minimal the associated burden. EEOC failed to satisfy the PRA's requirements. For this reason, the Chamber submitted a request for review of the EEOCs' Revised EEO-1 report to the OMB earlier this year.

A. The Revised EEO-1 Report Imposes Undue Burdens on Employers
With No Benefit

The burden estimates the EEOC submitted in connection with the new requirements of the EEO-1 report (1) underestimated the burdens of compiling, analyzing, and reporting the W-2 information; and (2) drastically underestimated the burdens of compiling, analyzing and reporting the hours information required by the new EEO-1 proposal. The EEOC calculated a one-time estimate for compliance at \$27,184,381.28 based on its estimate that it will take 8 hours per filer at a wage rate of \$55.81 for "developing queries related to Component 2 in an existing HRIS."⁵⁶ The revised proposal calculated the annual burden for compliance at **\$53.5 million** based on its estimate that it will take filers 1,892,978 hours to file Components 1 and 2 of the EEO-1 report each year.

Throughout the revision process, the EEOC continually shifted its burden analysis demonstrating the lack of rigor that went into its initial projects. Despite specific survey information submitted by the Chamber from over 50 companies, who together file approximately 20,000 EEO-1 reports on an annual basis, the EEOC refused to base its burden analysis on anything other than speculation and failed to provide any explanation of how it arrived at the hours or wage estimates. Indeed, contrary to the EEOC's burden estimate of **\$53.5 million** the Chamber's survey feedback estimated that employers would actually spend 8,056,045 hours complying with the reporting requirements at a cost of **\$400.8 million**.

Indeed, the EEOC failed to adequately estimate the costs associated with capturing "hours-worked" data for employees — a process that will require employers to exclude reporting on many of the hours components employees routinely receive such as vacation, sick pay, leave time, jury duty and other forms of paid-time-off. And while employers track hours data for non-exempt employees, the vast majority have no such system in place to capture the hours worked for salaried employees.

The Agency's burden estimates also demonstrated a gross misunderstanding of how employer human resource information systems function. Most employers do not maintain gender, race/ethnicity, payroll and hours worked information in one system. Retrieving this data from the various separate databases will require developing queries for each system which

⁵⁶ 81 Fed. Reg. 45479, 45497 (July 13, 2016).

maintains the required data — a process that will take much more than the one-time estimated implementation costs.

The Agency's annual burden estimate of 31.09 hours per filer demonstrates a similarly tenuous relationship with reality. Despite its discussion of developing queries as a one-time burden, the fact is that queries will need to be reviewed each year to account for factors that may not be accounted for in the original queries such as new job codes or payroll codes and may need to be completely re-written in the event of system upgrades to any one of the many systems that houses the information necessary to prepare the EEO-1 report.

Furthermore, even the most sophisticated data queries will not return information in a format that is ready to be uploaded to the EEO-1 reporting system. Each year, companies will be required to collect, verify, validate and report information that must be collected from multiple human resource information systems. This will be a collaborative process involving much higher level employees than the administrative support personnel that the EEOC has estimated will be performing the majority of the work. HRIS (Human Resource Information Systems) professionals, HR professionals, legal professionals, and company leadership will all be involved in various parts of the process. Simply put, the EEOC failed to accurately evaluate the actual burden of the new EEO-1 report.

B. The Revised EEO-1 Report Serves No Benefit

Despite the excessive burden imposed on employers, the EEOC failed to articulate a clear benefit associated with its proposed data collection. Further, the Sage Report which the EEOC used to inform its proposal, recognized that “[s]ummary data at the organization level will likely be of very limited use in EEOC practice.”⁵⁷ Despite this recognition, the EEOC pressed on with a one-size fits all solution for purposes of gathering pay and hours data. In this regard, the EEOC failed the PRA requirement to maximize the benefit to be derived from the new requirements imposed on employers.

Specifically, there is no utility in this data because the new EEO-1 form categorizes employees in broad occupational groups that inevitably results in comparison of employees in very different jobs, performing very different tasks, with very different skills. Such aggregate groupings are not permitted under the law.

For instance, the EPA requires that men and women at the same establishment be allotted equal pay for equal work. In addition to that requirement, Title VII prohibits employers from discriminating in pay on account of race, color, national origin, and a host of other protected characteristics. While prohibiting discrimination, both of these laws recognize that there may be

⁵⁷“ Sage Computing Final Report: To Conduct a Pilot Study for How Compensation Earning Data Could Be Collected from Employers on EEO's Survey Collection Systems (EEO-1, EEO-4, EEO-5 Survey Reports) and Develop Burden Cost Estimates for Both EEOC and Respondents for Each of EEOC Surveys (EEO-1, EEO-4, and EEO-5), p. 57 (Sept. 2015).

legitimate reasons for differences in pay. The EEOC Compliance Manual recognizes a variety of factors that can legitimately explain compensation differences.⁵⁸

As noted, the EPA prohibits employers from discriminating in compensation between employees working at the same establishment who perform “equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions”⁵⁹ based on sex. Any data that will be gathered under the revised EEO-1 will be useless for evaluating compensation under this standard. The EEO-1 report will provide the W-2 wage data within 10 broadly drawn EEO-1 job categories. These categories contain employees who work in jobs that are drastically different and will not allow for meaningful comparisons of employee compensation.

One example of the type of inappropriate comparisons that might be made under the EEO-1 data is a comparison of data entered by a hospital within the “Professionals” job category. This job category contains registered nurses, lawyers, accountants, computer programmers, dietitians, physicians and surgeons. These jobs do not involve similar skills or certifications nor do they require the employee to perform similar tasks, yet they are all reported within the same job category. The EEOC’s Compliance Manual recognizes that a comparison of such jobs is inappropriate under the EPA:

[A]n inquiry should first be made as to whether the jobs have the same common core of tasks, i.e., whether a significant portion of the tasks performed is the same. If the common core of tasks is not substantially the same, no further examination is needed and no cause can be found on the EPA violation.⁶⁰

By its own admission, the data that it purports to collect should not be used to evaluate compensation discrimination under the EPA.

The data is similarly useless for evaluating compensation discrimination under Title VII’s “similarly situated” employees standard.⁶¹ As discussed above, the EEO-1 job categories are so

⁵⁸ See EEOC Compl. Man. Ch. 10.

⁵⁹ 29 U.S.C. § 206(d).

⁶⁰ EEOC Comp. Man. Ch. 10, at p. 22, available at www.eeoc.gov/policy/docs/compensation.html, citing *Stanley v. University of S. Cal.*, 178 F.3d 1069, 1074 (9th Cir.) (EPA requires two-step analysis: first, the jobs must have a common core of tasks; second, court must determine whether any additional tasks incumbent on one of the jobs make the two jobs substantially different), cert. denied, 120 S. Ct. 533 (1999); *Stopka v. Alliance of Am. Insurers*, 141 F.3d 681, 685 (7th Cir. 1998) (critical issue in determining whether two jobs are equal under the EPA is whether the two jobs involve a “common core of tasks” or whether “a significant portion of the two jobs is identical”); *Brewster v. Barnes*, 788 F.2d 985, 991 (4th Cir. 1986) (same).

⁶¹ The EEOC Compliance Manual states that, “similarly situated employees are those who would be expected to receive the same compensation because of the similarity of their jobs and other

broad that they are not appropriate for conducting a meaningful comparison under Title VII. Using the same example of hospital professionals, it is implausible that a surgeon and an accountant either would be paid the same or that the content of those jobs would create the expectation that those jobs would be paid the same. Guidance by courts across the country suggests a similar skepticism of considering jobs comparable because they fall within the same EEO-1 category.⁶² Finally, the EEOC's Compliance Manual states that "differences in job titles, departments, or other organizational units may reflect meaningful differences in job content or other factors that preclude direct pay comparisons between employees,"⁶³ however, neither these nor any other non-discriminatory factors which might explain a compensation disparity are captured under the proposed EEO-1 revisions.

Employer compensation systems are all unique and there are myriad factors that impact compensation decisions and outcomes. Such systems cannot be normalized to conform to a one-size-fits all comparison. Employers are entitled to value jobs differently based on a wide-range of non-discriminatory factors; however, the EEOC ignored this reality.

Furthermore, even if two jobs are similar enough to allow appropriate comparison, employee choice may be the root cause of a pay difference between two employees. One employee may choose to work night shifts or weekends while another employee chooses to work a normal weekday schedule. The EEO-1 data would simply see two employees who worked the same number of hours, but who made different amounts despite the fact that the disparity is easily explained. This failure to account for differences that might arise because of employee choice is compounded by the use of W-2 wages, which includes "performance pay" such as commissions and overtime which are more a reflection of employee skill than of employer compensation decisions.

objective factors" and that for jobs to be deemed similar the "actual content of the jobs must be similar enough that one would expect those who hold the jobs to be paid at the same rate or level." EEOC Comp. Man. Ch. 10, at p. 6-7, available at www.eeoc.gov/policy/docs/compensation.html.

⁶² *Eskridge v. Chicago Bd. of Educ.*, 47 F. Supp. 3d 781, 790-91 (N.D. Ill. 2014). Although a similarly situated employee need not be "identical," *Caskey v. Colgate-Palmolive Co.*, 535 F.3d 585, 592 (7th Cir.2008), he must be "directly comparable to the plaintiff in all material respects...." citing *Naik v. Boehringer Ingelheim Pharm., Inc.*, 627 F.3d 596, 600 (7th Cir.2010); *Lopez v. Kempthorne*, 684 F.Supp.2d 827, 856-57 (S.D.Tex. 2010) ("Similarly situated" employees are employees who are treated more favorably in 'nearly identical' circumstances; the Fifth Circuit defines 'similarly situated' narrowly. Similarly situated individuals must be 'nearly identical' and must fall outside the plaintiff's protective class. Where different decision makers or supervisors are involved, their decisions are rarely 'similarly situated' in relevant ways for establishing a prima facie case."); *Alexander v. Ohio State University College of Social Work*, 697 F.Supp.2d 831, 846-47 (S.D. Ohio 2012) (To be similarly situated, a plaintiff's purported comparators must have the same responsibilities and occupy the same level position).

⁶³ EEOC Comp. Man. Ch. 10, at p. 8, available at www.eeoc.gov/policy/docs/compensation.html.

Collecting “hours worked” further degrades the usefulness of the data. The EEOC’s proposal invites employers to report “hours worked” by exempt employees by using either proxy values of 40 hours per week for full-time employees and 20 hours per week for part-time employees or to report the actual hours worked if the employer currently tracks that information. As discussed above, the majority of employers do not currently track such information, nor is the cost associated with starting to track such information considered in the EEOC’s burden estimate and therefore employers are likely to use the proxy variables which may not accurately reflect the hours the employee actually works.

Also, using “hours worked” a term that expressly excludes hours spent on vacation, sick time, jury duty or similar hours, will result in a disconnect between the hours attributed to an employee and the employee’s W-2 wages. This disconnect would lead to a difference in rate of pay between employees and may lead the EEOC to incorrectly infer that the company is discriminating when in fact any disparity would be owing to a benign and neutral factor.

In addition to the problems inherent in the data that the EEOC proposes to collect, its proposed statistical approach will also be unhelpful in identifying discrimination. The EEOC has proposed analyzing the collected data under the Mann-Whitney and the Kruskal-Wallis tests.⁶⁴

However, these types of analyses could easily lead to both false positives--flagging a company for closer review where all employees working the same job are paid equally--and false negatives--determining that pay disparities do not exist even if unambiguous compensation discrimination is occurring. Such results are possible because the aggregated data collected will not include the factors necessary to evaluate compensation.

In addition to testing a company’s data internally, the EEOC’s proposal also suggests that the Agency may “examine how the employer compares to similar employers in its labor market by using a statistical test to compare the distribution of women’s pay in the respondent’s EEO-1 report to the distribution of women’s pay among the respondent’s competitors in the same labor market.”⁶⁵ There is no statutory requirement that a company pay its employees in accordance with industry or geographic trends. Just as employers cannot defend themselves against claims of discrimination by claiming that such inequity is occurring throughout its industry or labor market, employers cannot be charged with discrimination because they pay less than their competitors.

C. The Revised EEO-1 Report Fails to Ensure Confidentiality

The EEOC will be collecting highly sensitive personal data regarding compensation at thousands of U.S. companies in a format which will not serve any of its statutory purposes but which will certainly be of great use to any hacker who is interested in the compensation practices of employers.

⁶⁴ 81 Fed. Reg. 5118, fn. 47 (February 1, 2016).

⁶⁵ *Id.*, at 45490.

In the hands of the wrong people, the original pay data from the EEO-1 report could cause significant harm to EEO-1 responders and subject employees to potential violation of their privacy. By letter dated September 23, 2016 the Chamber called to the attention of former Administrator Shelanski the GAO report of September 19, 2016 which criticized the government's response to cyberattacks, and noted that "[c]yber incidents affecting federal agencies have continued to grow, increasing about 1,300 percent from fiscal year 2006 to fiscal year 2015."⁶⁶ Unfortunately, although it is statutorily required to do so, the EEOC has failed to set forth appropriate steps or protocols to ensure the privacy and confidentiality of EEO-1 data.

In addition, the EEOC has failed to address the problem that it disseminates information collected under the current EEO-1 to other federal agencies, state and local agencies and even private researchers without the protection required of this data by Section 709(d)(e) of Title VII. It has completely ignored the additional risk of disclosure of the significantly more sensitive information to be generated by the revised EEO-1 report.

CONCLUSION

The EEOC has been granted a critical function in the oversight of employment decisions and the enforcement of the federal employment anti-discrimination laws so vital to our workplace. Indeed those laws represent at the highest level the recognition of our diverse and dynamic economy. While the EEOC has secured certain positive outcomes, the Agency's failure to conduct its responsibilities in a manner consistent with the purpose of its statutes has led to mission critical failures which should not be accepted.

⁶⁶ GAO 16-885-T: "Federal Information Security: Actions Needed to Address Challenges" (September 19, 2016), available at <http://www.gao.gov/assets/680/679877.pdf>.

Chairman BYRNE. Thank you, Ms. Olson. Thanks to every one of you, it was superb. Now, we go to the question portion of our hearing today. We are honored to have with us the chairwoman of the full committee, the Education and the Workforce Committee, Mrs. Virginia Foxx from North Carolina, and I recognize her for five minutes.

Mrs. FOXX. Thank you very much, Mr. Chairman. I want to thank the witnesses for being here today, although I want to say this is pretty depressing testimony about the lack of action on the EEOC.

I have to tell you, I am a person who absolutely abhors discrimination of any sort, and to hear the comments made about how the agency we consider most important, I think, in the government, and have for a long time, to make sure that we root out individual discrimination, it is pretty depressing.

Let me go on with my questions. Ms. Vann, as I said, the primary role of the EEOC is to investigate charges of discrimination filed by individual workers to fairly and accurately assess the allegations and make a finding.

Regrettably, you all testified and the chairman said in his comments, excellent comments at the beginning, that the backlog at the end of fiscal year 2016 was 73,508 unresolved charges. Some of them languishing for more than five years.

We all know the phrase "justice delayed is justice denied." You discussed the backlog in your testimony. Do you attribute the backlog to misguided policies and practices that can be changed? I think you imply that. Or, to a lack of resources? Would you say the emphasis on systemic investigations is the main reason for the persistently high backlog in the last eight years?

Ms. VANN. Thank you for that question. I would answer it this way, beginning with your question about resources. I am skeptical that the steady increase in the charge backlog, we've seen an increase over the last four fiscal years, is as a result of a lack of resources as the agency's budget has either been increased slightly or remained flat.

I would suggest that a large part of the backlog, the increasing backlog, is a direct result of the agency's misguided focus on systemic enforcement and the resources and time that is required to go into investigating those claims and prosecuting those claims.

Now, to be sure, the backlog is not the highest that it's ever been, but in fiscal year 1995, as an example, the agency had over 90,000 charges in its backlog, but that was well before some of the very important steps that the agency took, including implementing the National Enforcement Plan and putting into place the priority charge handling procedures that really helped to address those issues.

Mrs. FOXX. There is a similarity between 1995 and the last eight years, and that is these were both Democrat administrations.

Ms. Vann, you also say in your testimony that the delegation of litigation authority to the EEOC General Counsel, with no vote by the Commission in most cases, how this has led to inconsistency in enforcement across the regions. The delegation also makes the litigation program unaccountable to the Commissioners who are supposed to lead the agency.

How would you address this concern, and would you completely rescind the delegation so that the Commissioners must approve or disapprove legislation, or is there a mechanism you could see that would make this work better?

Ms. VANN. Yes, ma'am. I would urge the agency to rescind the delegation of litigation authority entirely, at least in most cases. Perhaps the agency could flip the current approach, which as established now, allows the Commission to review only a handful of cases, really at the region's discretion.

I would flip that model and have most of the cases except for perhaps a certain type of case go up to the Commission, and to that end, I would have the General Counsel also rescind his or her re-delegation to the regional attorneys and have General Counsel really making the call and being involved in every active litigation decision.

Mrs. FOXX. Thank you very much. I yield back, Mr. Chairman.

Chairman BYRNE. Thank you, Madam Chairwoman. The subcommittee is also honored today to have the ranking member of the full committee, the honorable gentleman from Virginia, Mr. Bobby Scott. I recognize him for five minutes.

Mr. SCOTT. Thank you, Mr. Chairman. Mr. Chair, this is the fourth hearing we have had in the last few years regarding the EEOC, but we have yet to hear from an actual Commissioner since 2013.

If we are going to criticize the priorities like individual cases, the value of class actions, and the various priorities, it seems to me we ought to invite a representative of the EEOC to explain their position.

Mr. Cox, can you explain how the criminal justice guidance is consistent with *Griggs v. Duke Power Company*?

Mr. COX. Sure. Congressman Scott, *Griggs* stands for the concept that Title VII should be extended or should be interpreted as being able to reach discrimination that is *sub rosa*, that is not overt, that is sort of under the radar. That principle now more than ever is very important, the so-called "disparate impact principle."

We know overt racial animus is something that we don't see as often as we used to, so *Griggs* is consistent with the criminal background check because that is exactly what is going on with the misuse of criminal backgrounds.

The criminal justice system as we have discussed has a disproportionate impact on people of color because they are overrepresented in that system for a number of reasons, historically.

We see and understand that so-called "race neutral" policies that overtly don't discriminate can have a disparate impact on people of color because of that disproportionate representation in the criminal justice system.

Title VII was interpreted as reaching that in 1975 in a case called *Green v. Missouri Railroad*. They set up a structure for employers to use in order to evaluate whether or not someone should be excluded because they had a criminal record.

The EEOC guidance reflects that, and they set up a structure within the guidance to advise employers on how to apply Title VII in a way that would both protect frankly them from liability but also afford opportunities to those with criminal records.

Mr. SCOTT. Thank you. I understand the EEOC is appealing a ruling of the Federal District Court in Michigan regarding the *Religious Freedom Restoration Act* and how it can possibly override Title VII. Can you explain the danger in allowing RFRA from overriding Title VII because an employer has a sincerely held religious belief?

Mr. COX. Certainly. That's the Harris Funeral Homes case, a transgender hiring case or employment case. I think cases like that, cases like Hobby Lobby, that allow for, as you described, sincerely held religious beliefs to be used to frankly discriminate or to exclude opens a dangerous door, and it threatens to open wide potential discrimination based on the number of bases, including race.

In the past, we have seen such excuses or such beliefs be used for racial discrimination, and it's a slippery slope, particularly, frankly, in a climate where we see discrimination based on religion, in terms of who can immigrate to this country or attempts to discriminate based on religion, on that basis.

So, we are very concerned about that, and would advise that not be the ruling obviously in this case but also not be policy.

Mr. SCOTT. A lot has been said about systemic versus individual cases. Can you tell me the value of systemic cases?

Mr. COX. Systemic cases for the EEOC allows them to focus on an industry, on issues, a much broader set of circumstances. I have to also clarify that even with systemic discrimination cases in the EEOC, it all starts with a charge. Individual cases that come in, when they investigate them, if there is an allegation that has broader implications for the employer or for an industry, it may become a systemic case. It doesn't automatically become a litigation either. It could be investigated and resolved that way.

There's not any inconsistency necessarily with an individual case or individual charge and a systemic piece of litigation. It's really about the strategy and the focus of the litigation, and why the EEOC decides to make it a systemic case. That is because there's an idea or belief there is a large set of circumstances or issues that can be addressed through the litigation.

Mr. SCOTT. Can you quickly say the value of the EEO-1 pay data collection?

Mr. COX. Sure. As Mr. Takano pointed out, we are still seeing discrimination based on pay data for women, people of color, men of color, and also sort of discrimination that exposes a gap between their pay and the pay of white men.

So, the idea behind the EEO-1 data collection was to afford employers an opportunity to collect information, collect data, and inspire them frankly to do some self-checking to perhaps get their own systems in order, so they are no longer discriminating.

I understand the critique that's been leveled against the collection data, that it's not perfect, that it is seen as not necessarily getting the results that some would think are warranted.

However, I think the response to that is to make it better, and to help the EEOC do a better job in doing the data collection, but the answer can't be not to comply or not to give the EEOC—

Chairman BYRNE. Mr. Cox, I am very sorry, you are going to have to wrap up fairly quickly.

Mr. COX. Sure. That's really the answer to the question.

Mr. SCOTT. Thank you.

Chairman BYRNE. Thank you, Mr. Scott. I now call on myself for five minutes. Ms. Vann, the Obama administration made a number of claims over the years about the benefits of mandating the reporting of pay data.

The Department of Labor's 2014 proposal to require federal contractors to report pay data said the data summarized at the industry level would enable contractors to "assess their compensation structure along with those of others in the same industry and provide useful data to current and potential employees."

Quite apart from what the statutory obligation of an agency is, does not the Bureau of Labor Statistics and private entities already publish aggregate pay data for different occupations in geographical areas that is more refined and detailed than the EEOC will be able to publish?

Ms. VANN. Mr. Chairman, I believe that's correct. The data that the EEOC would publish would provide no benchmarking utility whatsoever, aside from the lack of utility in its ability to identify actual potential discrimination.

That is because even within industries, employers have very wide-ranging compensation and pay setting systems. Employers do not compensate their employees in the same way. There are a myriad of variables that go into calculating an individual employee's or class of employees' pay, so looking at those aggregated data as an employer, even within a particular industry, cannot tell me anything about where I am insofar as being a responsible employer that is complying with the law.

Chairman BYRNE. The second purpose listed in the *Paperwork Reduction Act*, and that is where the EEO-1 is coming from, the *Paperwork Reduction Act* increases paperwork. Only in Washington does that make sense.

The second purpose is to "Ensure the greatest possible public benefit from a maximized utility of information created, collected, maintained, used, shared, and disseminated by the Federal Government." Another purpose is to "Improve the quality and use of federal information to strengthen decision making and accountability."

With respect to enforcement, will the pay data the EEOC collects be sufficiently refined or rigorous enough to be used as evidence in a court of law?

Ms. VANN. Mr. Chairman, I believe it will not because again what the data collection purports to do is to provide to the enforcement agencies or to other outsiders summary data, which inherently is comparing apples to oranges.

They're not comparing similarly situated individuals. It cannot produce data that is refined in that way because of all the problems and issues that were described by Ms. Ponder and others.

Chairman BYRNE. Ms. Olson, according to your testimony, EEOC vastly underestimated the burden estimate of the pay data reporting requirement by around \$350 million. Would this error in the burden estimate constitute grounds for the Office of Management and Budget to rescind its prior approval of the pay data collection?

Ms. OLSON. Thank you. The answer is yes. Under the *Paperwork Reduction Act*, Section 3517 actually compels OMB to review and rescind a previously approved data collection device if the agency that proposed it substantially underestimated its burden.

It could really do one of two things. It could either review it and rescind it or it could stay its effectiveness until there was an opportunity to have further review and input into that process.

Chairman BYRNE. Thank you. Ms. Ponder, you talked about mediation. I am a fan of mediation like you are. Explain from both an employer's perspective and an employee's perspective why mediation is a good thing.

Ms. PONDER. Thank you, Mr. Chairman. From the employer's perspective, it is a time to look at the facts of the matter, see what happened, did we do something right, did something wrong, and really get a feel for the case. It is a time to actually hear from the claimant. A lot of times the complaints from the EEOC are very brief, and we actually have no idea what they're claiming. We always want to go to mediation and hear what they have to say and be able to assess what we need to do at that point.

It's a time where we can settle it quickly, which for the employer is a good thing. We can move on, improve our practices, anything that we need to do that we've learned from the settlement.

On the employee's side, the same thing. It's finality and quick. Sometimes these things can be taken care of within a few months of the claim being filed. Everyone goes on with their lives.

Chairman BYRNE. Thank you very much. I now call on Mr. Takano for five minutes of questions.

Mr. TAKANO. Good morning. Thanks to all the witnesses. Ms. Olson, I want to begin with you. I just received some news about the Trump administration budget this morning. I have just learned they recommend moving the Office of Federal Contract Compliance Programs or OFCCP to the EEOC.

I understand the Chamber has gone on record opposing this move. Can you share with us some of the Chamber's major concerns with this recommendation?

Ms. OLSON. Thank you for your question. Yes. I chair the EEO Subcommittee for the U.S. Chamber, and just last Friday, we had an extended conference call with companies across the country, approximately 50 companies joining. Each and every one of them expressed very serious concerns regarding a merger of the two agencies.

Both the EEOC and the OFCCP are in need of reforms, and time would be better spent more efficiently, more effectively, more quickly on putting emphasis toward that as opposed to merging the two agencies.

The two agencies serve very two different primary missions. Former, to advocate affirmative action and diversity, while the other to pursue discrimination claims as non-discrimination in employment. They have very different procedures. They have very different remedies.

There is a concern that mixing the two different missions with very different enforcement devices as well as remedies is really going to confuse the issue as opposed to actually streamlining the mission, very different missions, of both of those agencies.

Mr. TAKANO. Thank you. Mr. Cox, you might want to elaborate on the differences between EEOC and OFCCP and/or express your concerns about merging the two agencies.

Mr. COX. Sure. We would also oppose that and are very concerned about it. I think for us, we are worried that the missions of both agencies or both offices would be undermined.

The EEOC, as has been discussed, is primarily a charge driven, complaint driven agency. OFCCP is more of a front-end focused organization. They're doing audits. They're assessing potential problems and helping employers on the front-end.

We're concerned that by shifting the mission of OFCCP to the EEOC, it would definitely hamper the EEOC's ongoing work, particularly its systemic work, which we think is very important.

We also worry that shifting that responsibility over without an increase in resources would undermine the EEOC's ongoing work as well. We already know the EEOC is suffering from being flat funded over the years, its inability to do aggressive hiring to meet the charges that are being filed with the EEOC.

So, we have some serious concerns with that merger.

Mr. TAKANO. I am heartened to hear that some on the Majority are concerned about the size of the backlog. I also understand the strategy of pursuing systemic review. Of the 90 some odd cases in the backlog, do we understand if there is any pattern of those cases that would lend credence to the systemic strategy?

Mr. COX. Well, I think it's important to think about the backlog and systemic work or the work of the agency in general as complimentary. When I was at the EEOC working with Chair Berrien, she prioritized getting rid of the backlog, which has been talked about, why over the years it has come down. It's still significant, but it's come down significantly over the years.

I think the way the backlog comes down is by looking at charges, resolving some that are not meritorious, moving some along the enforcement track, and then considering moving those down the enforcement track to possible litigation.

Also, identifying those charges which again will have large impacts, that will have the ability to significantly move and protect a broad swath of rights in a particular industry.

So, working on the backlog and reducing that is not at all at odds with systemic work or the work of the agency as a whole. I think what we want to do is think creatively about how we can use our investigative tools up front to make sure we can reduce the backlog, but also be strategic and focus on the most egregious discrimination that we see out there.

Mr. TAKANO. Can you address more about the issue of pay data? We have heard a number of witnesses claim it is not going to do any good or it has no real purpose.

Mr. COX. Sure. As I said before to Mr. Scott, you know, the need for the pay data is clear, the disparities, particularly racial disparities, are well known and well documented.

The critique that has been leveled that somehow the EEOC data collection is flawed does not remove the need to address pay discrimination, and what the EEOC would do with the data that has not really been discussed is not only use it for enforcement tools affirmatively, but provide an aggregate look at where we are with

regard to pay discrimination regionally, by industry, they could do reports that would inform the public and employers about pay discrepancies, and to the extent employers are doing their own work internally that they think is better, I think one way to approach this is for them to partner with the EEOC and help them improve their data collection.

I don't think the answer is—I know the answer is not to comply with the need to resolve pay discrimination.

Mr. TAKANO. Thank you, Mr. Chairman.

Chairman BYRNE. Thank you, Mr. Takano. The chair now calls on Mr. Grothman of Wisconsin for five minutes.

Mr. GROTHMAN. Sure. I will start with Ms. Ponder or Ms. Vann. I am looking at this EEO-1 Form, which is the old form, which just hits me as incredibly burdensome, and I guess the number of data points is going to increase by a factor of over 10. Who has to fill out this form?

Ms. PONDER. In most companies, it is the H.R. Payroll Department.

Mr. GROTHMAN. Which companies?

Ms. PONDER. Companies that have over 50 employees in one location.

Mr. GROTHMAN. Any company with at least 50 employees has to fill out one of these forms?

Ms. PONDER. Yes.

Mr. GROTHMAN. How long has this been going on? How long have we been putting them under the problem of having to fill out this form or a predecessor of this form?

Ms. PONDER. That, I don't know.

Mr. GROTHMAN. Anybody know?

Ms. VANN. Decades.

Mr. COX. Over 50 years.

Mr. GROTHMAN. Over 50 years. Good we have Mr. Cox here, he knows what is going on. Over 50 years. For those of you back home that cannot see it, we have a form listing income, a plethora of job descriptions, male/female, and a variety of different races or ethnic groups here. This has been going on for 50 years.

When you fill out this form, does it affect any hiring, firing, or promotion decisions of companies, and when they make these decisions, do they worry about how it is going to look on this form?

Ms. PONDER. I can speak for my company, and we do look at them on a yearly basis. The form as it is today does give information where we are as far as men and women and the different races, and we do make sure that we're following the data there.

I can tell you our internal data is much more specific, but we're going to look at the EEO-1 Report as it stands today.

Mr. GROTHMAN. You are with SHRM. It is the Society for Human Resource Management; right?

Ms. PONDER. Yes.

Mr. GROTHMAN. When you make a hiring decision or a firing decision or a promotion decision, you begin to think how is it going to look at the end of the year on my EEO-1; correct?

Ms. PONDER. Not how it's going to look, but are we actually hiring a diverse workforce. It's a tool that we can use today. It's one

of many tools that we use to make sure we're hiring a diverse workforce.

Mr. GROTHMAN. You come from a big company, I take it. I do not know. How many employees?

Ms. PONDER. Over 25,000, in charge of about 1,000 in the U.S.

Mr. GROTHMAN. So, you probably do this in-house, but the smaller companies, they hire firms to fill out these forms for them; correct?

Ms. PONDER. Correct.

Mr. GROTHMAN. Usually, when those firms contract out to somebody, those organizations make suggestions as to who they should hire, I am told. Is that true?

Ms. PONDER. As far as looking at the form as it is now?

Mr. GROTHMAN. Yes.

Ms. PONDER. The form is self-evident, looking at your population, if you're hiring the right diversity—

Mr. GROTHMAN. It is self-evident you feel you have to hire certain people, and this has been going on for about 50 years now, in which we kind of push people into hiring one person over the other person?

Ms. PONDER. I wouldn't say "push." I would say keep us informed to make sure we are hiring a diverse workforce in the locations that we can.

Mr. GROTHMAN. It affects who you hire? These forms affect who you hire, you have two people in equal positions or close to an equal position, you may hire one person over the other person so it looks good on the form?

Ms. PONDER. I've never done that.

Mr. GROTHMAN. You may or may not have. You say you are working towards making the form look better; correct?

Ms. PONDER. We would like to make sure we're hiring a diverse workforce in the locations—

Mr. GROTHMAN. You are saying things but both things cannot be true. Either you are looking to make the numbers come out right for the federal government or you are not.

Ms. PONDER. Not for the federal government. We don't base our hiring decisions on the EEO-1 Report. We base our hiring decisions on many data points to make sure again that our workforce is diverse. A diverse workforce is better for us. There are more ideas. There's more inputs coming into the business. Diversity is important for many reasons. The EEO-1 Report is one tool that we can use to see how we're doing.

Mr. GROTHMAN. Okay. I will move on. How much do you think, and either for you or Ms. Vann, nationwide, we spend every year even filling out the current form?

Ms. VANN. Sir, I don't have a precise estimate, but I would say it is in the tens of millions of dollars.

Mr. GROTHMAN. I will wait around for the second round.

Chairman BYRNE. Thank you, Mr. Grothman. The chair now recognizes the gentlewoman from North Carolina and my co-chair in the HBCU Caucus, Ms. Adams, for five minutes.

Ms. ADAMS. Thank you, Mr. Chair, thank you, Ranking Member Takano, for bringing us together and to the panel, thank you very

much for your testimony today, to discuss an issue that has major implications for our nation's economic outlook.

The EEOC plays a critical role in promoting equal employment opportunity for American workers, including young people, our next generation of workers. Now more than ever we must do what we can to promote employment opportunities for youth. Nationally, almost 5 million young people are disconnected from both school and work.

In my district in North Carolina, almost 15,000 young people are disconnected, and the disconnection rate for black youth is 16 percent. EEOC plays a pivotal role in breaking down barriers of employment for young people, especially young men of color.

I do support the discussion about diversity. I think that is so critical, and I hope we are looking at the focus as well as making sure we are being inclusive.

As a follow up, Mr. Cox, first of all, can you specifically speak to how EEOC's guidance on criminal background checks can help lessen barriers to employment for young people, especially young men of color?

Mr. COX. Certainly. First of all, the EEOC has an entire program dedicated to youth and youth at work, doing public education, designed public education programs focused on particular employment responsibilities and rights associated with work targeting youth.

With regard to criminal background checks and criminal records, as I said before, the discredited war on drugs has disproportionately impacted people of color or communities of color, and given the prevalence of criminal records in communities of color and the ripple effect that it has had on young men of color, yes, eliminating blanket exclusions based on a criminal background would definitely help advance opportunities for that group.

Ms. ADAMS. So, as a follow up, can you talk a little bit about what impact lessening these barriers and EEOC engagement in general can have on the economic outlook for communities of color?

Mr. COX. Sure. Well, with regard to criminal background checks?

Ms. ADAMS. Right, absolutely.

Mr. COX. We know folks with criminal records face a number of barriers, folks who are newly released from prison or folks who have criminal records but never went to prison, facing enormous lifelong barriers, ability to get a job, ability to have housing, ability to get an education, all of which have ripple effects for them, for their communities, for their children going forward. Reducing earning opportunities, reducing opportunities for advancement economically. It impacts the entire community.

It puts our communities at risk. We know that not having a job, not having housing, not having an education increases the likelihood that someone will recidivate. By offering opportunities, by removing the Scarlet Letter of sorts, of a criminal record, and removing the blanket exclusion of those with criminal records, we offer opportunities to increase economic opportunities for entire communities, but also to make our communities safer.

Ms. ADAMS. Thank you, sir. In Footnote 42, page 17, Ms. Olson essentially asserts that for nursing homes or other health care fa-

cilities, it might be too expensive to assess whether a drug dealer or serial rapist is a suitable fit for employment.

Mr. Cox, in your opinion, how difficult or expensive is it actually for an employer to simply conduct an individualized assessment at the appropriate stage in the hiring as the 2012 guidance recommends?

Mr. COX. Sure. Well, two responses to that. First, I think it is important to reorient ourselves with regard to what we're talking about here. We're talking about a mandate pursuant to the *Civil Rights Act of 1964*. These are activities that employers should have been complying with since 1975.

The guidance merely restates those requirements, laying out three tests that employers should apply regarding whether or not to exclude someone with a criminal record.

So, I think the guidance really affords employers an opportunity to be efficient in how they conduct this. It lays out a very good, clear plan for how employers should look at a candidate and decide whether or not they should be excluded.

The individualized assessment while not required by Title VII, in some ways breathes life into that process, and frankly, allows an employer to really incorporate that inquiry into its normal hiring process.

Ms. ADAMS. Okay. Thank you very much. Mr. Chair, I yield back.

Chairman BYRNE. Thank you, Ms. Adams. The chair now recognizes the distinguished gentleman from New Jersey, Mr. Norcross.

Mr. NORCROSS. Thank you, Mr. Chairman and ranking member. I represent over 200,000 people 55 years old or older. They have worked hard to build careers, raise families, excel at their jobs. Become outstanding members of their communities.

We all know our economy is changing. Most people no longer work at just one company or even in the same profession for their entire career. This can be particularly difficult for older Americans who reinvent their career if their job becomes obsolete.

For example, when a sales rep in New Jersey hit 60 years old, her quotas were changed completely to make it unachievable. Same thing happens for others over the age of 55.

It is vital we protect employment opportunities for older Americans and perhaps more important now than ever before.

A few weeks ago, the House passed the *American Health Care Act* that loosens the rules that allow insurance companies to charge older Americans higher premiums. Half of all Americans share in the cost of their health insurance premiums with their employers. When health insurance premiums cost more for older employees, it costs more for the employers.

This creates another incentive for employers to use discriminatory practices, fire or avoid hiring older Americans altogether.

Mr. Cox, talk about some of the challenges facing older Americans in the workforce as it relates to discrimination, reminding you that this is the 50th anniversary of the *Age Discrimination and Employment Act* in our country.

Mr. COX. Thank you, Congressman. Two responses. First, when I was at the EEOC, one of the major concerns that was raised was agreements that folks would be forced to sign that they would retire after a certain point in their employment process. There were

cases that the EEOC litigated in that regard, and had a lot of opposition from my colleagues on this panel regarding the efficacy of extending age discrimination laws and strategies to protect that group.

So, I think that is something we need to be aware of and think about. When someone goes and applies for a job and agrees to a job at a certain age, and they are in some ways coerced into signing a document saying at 55 or 60, they're going to retire, we need to be looking very closely at that. I think the EEOC was doing that, and I hope they will continue.

I think the other thing to consider is that all of the strategies that we have been talking about, disparate impact, systemic, really apply across the board, across all of the EEOC's bases within which it does its work, whether that be race, sex, age, LGBT, or anything else.

So, I think when you attack disparate impact or you attack systemic in one context, you really are pulling a thread at the overall enforcement strategy and tapestry of the agency that will affect everyone in this country who works, whether they be someone over 40 or over 55. Whether they are someone who faces discrimination based on race or sex.

Mr. NORCROSS. Certainly, in making those decisions, employers take many things into consideration, like costs versus relevancy, experience of their employees is extremely important.

You have two sides of the equation, and as we look into our health care system and the costs for older Americans are going to go up, that really impacts some of the decisions and the data collected is so relevant because particularly in a small company, is not able to look at that from their side of the aisle. It is very difficult to know what the employer is paying everybody.

That is why the information collected is so important. Would you not agree?

Mr. COX. I would, Congressman. I think a critically important part of all of this is collecting it in an aggregate way. Obviously, the EEOC can use the data to inform its own enforcement, but for the Legal Defense Fund, it's critical for us to be able to see aggregate how an industry is behaving, how a particular set of employers are behaving in a region.

We want to be able to lift up that information to inform our stakeholders, to inform other employers regarding the importance of not discriminating based on race and based on pay, and we want to be able to use that to educate folks.

Mr. NORCROSS. Without this information, in many ways it would be impossible to see that.

Mr. COX. That's correct.

Mr. NORCROSS. Thank you. I yield back.

Chairman BYRNE. Thank you, Mr. Norcross. The chair now recognizes the gentleman from Arizona, Mr. Grijalva, for five minutes.

Mr. GRIJALVA. Thank you very much, Mr. Chairman. Mr. Cox, the unstated choice being presented today is the EEOC's work on individual cases versus systemic, broad-based, policy and practice over multiple entities, is it an either/or proposition?

Mr. COX. No, it's not, Congressman. I think, as I said earlier, and I really want to emphasize this, EEOC is a charge driven organiza-

tion. It's a charge driven agency. It all begins with a charge. You look at that charge and you make a determination regarding the strategy that you're going to use to pursue it.

Sometimes that charge may evolve into a larger systemic case, some folks would call that a "class" case, although the EEOC does not have that specific authority in the same way my organization does and can pursue.

The bottom line is it all begins with a charge. It all begins with the charge comes through the door and the decisions are made on the merits regarding what to do.

I think the other piece to think about is the EEOC sets priorities. The one thing we haven't talked about is the strategic enforcement plan that the EEOC issued this year and the last year, which lays out priorities for the agency to pursue, including emerging areas of discrimination. That also helps shape the priorities and the lens it uses in evaluating any of the charges that come in.

Mr. GRIJALVA. The other question is—I do not know what the Trump recommendation is in terms of the budget regarding the EEOC, in particular, what allocation is being indicated there.

Given the fact that maybe for the last four fiscal years, it has basically flat lined, not a reduction in EEOC activity, and the backlog that people complain about, it is a resource issue from your perspective, being able to deal individual plus what we just said on the either/or proposition?

Mr. COX. Sure. I think with regard to the backlog and with regard to its ability to file more cases, do more investigations, it's definitely a resource question. There have been a number of years, with all Federal agencies, but particularly the EEOC, who typically is under resourced from the very beginning. They have been living with continuing resolutions that flat fund them, but also living with, in the time I was there, a government shutdown, hiring freezes, the inability to actually source and plan for hiring in a way that is consistent with and allows them to be strategic, and that is something we all would favor. We think more resources would be in line.

Mr. GRIJALVA. Accountability in terms of employment practices in this nation is an important part of the responsibility of the EEOC. We have not spoken about that, but I think it is important today in the testimony that EEOC, whether it is systemic cases, broad-based, the individual cases, provide fairness and the enforcement of law, and accountability.

Could you speak to the issue of accountability and why the function is tied to that?

Mr. COX. Sure. I'm glad you asked that question. I think it is important not to lose sight in our discussion today about what this is frankly all about.

The *Civil Rights Act of 1964* is the embodiment of *Brown v. Board of Education*, which was sort of the tool for removing the stain of race discrimination in this country. The EEOC is the offshoot of the *Civil Rights Act*.

So, it's important not to commodify rights. It's important not to simply see them as a cost of doing business.

I think my colleagues, if they have a concern about Brown, they have a concern about the *Civil Rights Act of 1964*, we should actu-

ally have that conversation separately, and I'm happy to have that conversation, but I think today we should be talking about how we make the EEOC better, and how we can actually improve on its enforcement capabilities, how we can make sure the EEOC is holding all of us accountable, to make sure we're increasing employment opportunities.

Mr. GRIJALVA. It is not about window dressing or it is not about them. It is a broad-based responsibility, not only to the *Civil Rights Act*, but to employment discrimination across many areas in this country.

I yield back, Mr. Chairman.

Chairman BYRNE. Thank you, Mr. Grijalva. The chair now recognizes the gentleman from California, Mr. DeSaulnier, for five minutes.

Mr. DESAULNIER. Thank you, Mr. Chairman. I want to thank the witnesses, the chairman and the ranking member for having this hearing.

It is a little bit hard to process for me at this point in my life having lived through managing and owning businesses in California in the 1970s and 1980s and 1990s, when we had affirmative action, and in California, where we have fairly aggressive mechanisms in our legal process, but also just culturally, where equal opportunity, I always thought as an employer, was something that benefitted everyone. In the 30 to 35 years I managed people, I can never remember it being a burden.

Of course, as a small business person, you are always struggling, so when you have added layers, you have to think about it, first of all, it is just human nature. You tend to think how this makes your job more difficult, but then you think about the greater benefit.

I certainly think in the Bay Area in California, we have benefitted from these protections, irrespective of the group of people we were trying to protect, and in a period of time when in this country opportunity is suffering in a country that prides itself on merit and hard work and the ability for talent to be able to rise up, that we are going in the opposite direction in this country, particularly in these protected classes.

Mr. Cox, I have a couple of questions for you. We have had testimony today that at least appeared to be critical of the mediation process at EEOC, and who should accept the burden, and whether that was impartial or not.

My understanding is the mediators are vetted to make certain they are impartial as possible, and the government actually covers the costs.

Could you illuminate us on that?

Mr. COX. Sure. Yes, the government does cover the costs of mediation, that is my understanding as well. I think the mediation process is one tool the EEOC uses to resolve claims before litigation, like conciliation, like any other process.

In the mediation process, in terms of who is speaking for the EEOC, that is the enforcement personnel, the folks who are doing the investigation, the folks who are in some ways advocating for the position of the EEOC, but the mediator stands as someone in between to try to work out the issues that are there.

Mr. DESAULNIER. I want to talk a little bit about amicus. You obviously are very active in your role in the amicus subject. There has been criticism that the amicus process at the EEOC has had numerous "defeats." Could you give your perspective on that view?

Mr. COX. Sure. Well, I can talk about how we approach our amicus program. First of all, amicus curiae offer their perspective to a court. They are called "Friend of Court Briefs" that are filed at any level within our judicial system.

It's designed for parties or organizations that have an interest in a particular matter to share their perspective and expertise, and the EEOC's amicus program, they take great pride in it. The EEOC has an enormous amount of experience across a wide range of areas, so they have a robust program that they engage in.

At the Legal Defense Fund, we do the same thing. We partner with the EEOC in filing amicus briefs in cases that they are working on, again, when we have an interest and we want to be able to advance our perspective on a particular matter.

Mr. DESAULNIER. I have one other area that I want you to respond to or have the opportunity to respond to. There has been testimony today that "Rather than focusing on increasing its systemic litigation docket, the EEOC should do more on the front-end to ensure that all discrimination charges it receives are properly categorized, investigated, and resolved."

On the surface, that makes perfect sense. Could you respond in the context of their budget being flat lined recently?

Mr. COX. Sure. Certainly, aligning the budget numbers with the amount of charges coming in would certainly help. I think the EEOC certainly has in place a strategy for dealing with and addressing charges that come in.

This is in some ways responsive to your question, this notion that the EEOC is trigger happy or EEOC is just willy-nilly filing lawsuits is belied by the fact that they filed 86 lawsuits in 2016, brought in 92,000 charges.

Some would say and some have said that is a problem, if they filed double that, folks again on the panel would say that's a problem. I think it doesn't indicate that the EEOC is wildly filing lawsuits as opposed to dealing with and addressing charges on the front-end.

I think increased resources and allowing the EEOC to be able to plan for hiring, again, this sort of willy-nilly C.R. approach that we have had in our budgeting doesn't allow agencies to properly plan, and I think that's been an issue.

Mr. DESAULNIER. Thank you, Mr. Cox. I yield back.

Chairman BYRNE. The gentleman yields back. I would like to thank all of our witnesses for taking the time to testify before the subcommittee today. You each did a splendid job. Thank you for your testimony.

Mr. Takano, do you have any closing remarks?

Mr. TAKANO. I do, Mr. Chairman. Mr. Chairman, I appreciate that you held the hearing today on this subject. The name of our subcommittee, I want to remind everyone, is Workforce Protections, meaning that we should be doing our best to protect workers.

Mr. Chairman, the EEOC's job should be about getting results for America's workers, not providing full employment for law firms

looking for new ways to prevent resolution of a disputed discrimination case. We know all too well that justice delayed is justice denied.

We have heard today about the burdens on employers that some feel the EEOC has placed, but we need to think about working people. When we talk about banning the box, we are not just discussing a policy initiative, we are talking about allowing real men and women a fair shot at a good job and life.

When we talk about the EEO-1 Pay Data Form and the EEOC's work to end pay discrepancies, we are talking about ensuring that real people are getting all of their hard-earned money.

The EEOC's work is still very much needed in our workforce, and we should not seek to hold them back. The Majority's claims that expanding the EEO-1 Form is burdensome was disproved by testimony today, even by some of the Majority's own witnesses.

Much of this data has been collected for 50 years, and the employers already have W-2 data, which is one of the two forms of data the EEOC is proposing to add to the EEO-1.

Ms. Ponder just told us that most employers' internal forms, meaning those forms that are not mandated by the federal government, are more detailed, and EEO-1 is just one of the forms employers collect and report on.

I very suspicious the claim that data collection proposed under the EEO-1 Form is overly burdensome, it is admittedly complex, but I think collecting that data is very much common sense, and in the interest of trying to address the problem of pay disparities among minorities and women.

Workers need to be protected, and that is why this subcommittee exists. As one of the seven openly LGBT members of Congress, I am encouraged by the work that the EEOC has undertaken to advocate for the rights of LGBT individuals under Title VII. All workers should feel safe and welcome in their work environments. Workers should not feel as though they are unwanted in their own workplace simply because of who they are, whom they love, or the color of their skin.

I am disappointed once again, Mr. Chairman, that we have yet to have another hearing on the EEOC without actually inviting a representative from the Commission. We need to hear from the Commissioners directly.

We have seen three of today's witnesses express their extreme reservations about combining the EEOC with OFCCP as a recommendation coming down today from the administration.

I thank you for holding this hearing, and I yield back the balance of my time.

Chairman BYRNE. Thank you, Mr. Takano. Once again, I want to thank the witnesses. The 1964 *Civil Rights Act* makes America a better place. I know that because I am from Alabama. Alabama and things that happened in Alabama had a lot to do with the fact that we have a 1964 *Civil Rights Act*. I was nine years old when it was adopted. I got to grow up in Alabama and watch the beneficial changes from this law, and I strongly support it. It has done so many good things for people across America.

I want to make sure we do everything in this subcommittee to assure that it's there for as far as the eye can see and it really works for the people of America.

Now, the people that come to the EEOC seeking help are by definition "workers." They are working, they are getting paychecks. We take money out of their paychecks every week or every two weeks, however they are paid. That money comes to the Federal Government, and it is supposed to go to departments and agencies that are there to help them.

So, it is disturbing to me when we are supposed to be here to help them to find out, as I said earlier, unresolved cases are 90 percent higher in the last eight years than they were before, 90 percent.

This is how it works, and the witnesses know this. An individual files a charge with the EEOC, the respondent, the employer, is told, given notice of it. The EEOC is supposed to investigate.

There is nothing in that law that says the employee has to get a lawyer. That is why money was taken out of their paychecks to pay for this agency to investigate these claims. I can tell you as a practitioner, I rarely saw an investigation. Most of the time, there would be this long period of silence, and then a Right to Sue letter would come down.

As a practitioner, I am a lawyer, that is what I do for a living, that is fine. You know, it is really not the way it is supposed to work. That agency was supposed to investigate the claim, and then if there was merit to it, go do something about it.

Ms. Ponder and Ms. Vann talked about mediation. It works. You did not have to bring a claim in a lot of these cases, you mediate it and you get it resolved, quickly, as Ms. Ponder said, which is good for both the employer and the employee.

Yes, you can do all that without a lawyer, and the employee does not have to pay a lawyer or have money taken out of whatever, the recovered amount is.

It is better for the working people of America that we have an agency that simply does its job, and the evidence is overwhelming that in the last eight years, the EEOC did not do its most fundamental job, and we need to get it back to doing that fundamental job.

I have heard a lot about these systemic cases. If there is a real systemic case out there, go make it. When I was a lawyer, that is what judges would tell us. Go make your case. The evidence we have is that many of these systemic cases turned out to be cases they could not make, and they have been reprimanded by federal judges for trying to make them. A further waste of resources that we do not have room to waste.

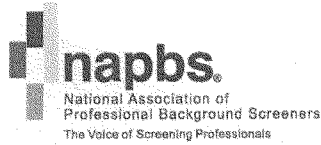
This new EEO-1 plan, I said this earlier, only in the federal government would we use the *Paperwork Reduction Act* to come up with something that increases by 26 times the amount of information employers already provide. We have already heard this new data cannot be used as evidence in court, so once again, we are detracting ourselves from where we are supposed to be, which is taking care of these claims by individual Americans, the very heart of what the EEOC is supposed to do.

I want very much for the EEOC to get back to the role designed by the 1964 Act for it to do. We are all about the individual workers in America on this subcommittee. I thought each and every one of you did a great job. You laid out the issues for us in a way that I think we all can understand.

Now, it is our job on this subcommittee and the committee as a whole to work together to make sure we get the EEOC back to doing what it is supposed to do. That is to protect every American from unlawful discrimination by using the authority they have had for over 50 years, and using it in the appropriate way.

There being no further business, this subcommittee stands adjourned.

[Additional submission by Chairman Byrne follows:]



May 23, 2017

The Honorable Bradley Byrne
Chairman, House Education and Workforce
Subcommittee on Workforce Protections
2176 Rayburn House Office Building
Washington, DC 20515

The Honorable Mark Takano
Ranking Member, House Education and
Workforce Subcommittee on Workforce
Protections
2101 Rayburn House Office Building
Washington, DC 20515

Re: The Certainty in Enforcement Act, H.R. 1646

Dear Chairman Byrne and Ranking Member Takano:

The National Association of Professional Background Screeners (NAPBS) is pleased to submit comments to the Subcommittee as part of its hearing on "The Need for More Responsible Regulatory and Enforcement Policies at the EEOC (Equal Employment Opportunity Commission)." NAPBS represents over 800 member companies engaged in screening across the United States dedicated to providing the public with safe places to live and work. Our member companies are defined as "consumer reporting agencies" pursuant to the Fair Credit Reporting Act (FCRA) and are regulated by the Federal Trade Commission (FTC), the Consumer Financial Protection Bureau as well as the EEOC.

As the Subcommittee conducts its work in this area, NAPBS would like to call to your attention the Certainty in Enforcement Act, H.R. 1646, sponsored by full-committee member Rep. Tim Walberg. H.R. 1646 provides an important protection to employers who follow laws requiring them to conduct a criminal background or credit investigation of certain employees by exempting those employers from a claim of disparate impact by the Equal Employment Opportunity Commission when the employer considers credit or criminal record information under a federal, state or local requirement to do so.

Quite simply, companies should not be forced to choose which law they should follow. As an example, a number of states require home health care providers to conduct background checks on prospective employees and prohibit home health care providers from hiring individuals with certain criminal backgrounds. However, companies following these state



laws may still be subject to an enforcement action by the EEOC or another lawsuit under a theory of disparate impact under guidelines issued by the EEOC in 2012. H.R. 1646 is designed to remove employers from this ethical rock and a hard place. The Certainty in Enforcement Act would amend Section 703 of the Civil Rights Act of 1964 to include language to protect employers that conduct a credit or criminal background check under a government mandate from being sued simply because they are following the law requiring the background check.

H.R. 1646 reflects several years of work by members of the Committee dating to a general oversight hearing in the summer of 2014 regarding the EEOC which led to the introduction of the Certainty in Enforcement Act (H.R. 5423) along with other EEOC reform bills including the EEOC Transparency and Accountability Act (H.R. 4959) and the Litigation Oversight Act of 2014 (H.R. 5422). These bills were the subject of a legislative hearing in September 2014 and again in the 114th Congress in March 2015. Over time, the bill's language has been modified to incorporate views from a wide range of stakeholders and we believe would provide much needed protections to employers who should not be exposed to an EEOC enforcement action simply by following the law.

We appreciate the Subcommittee's continued work in this area and would encourage the Subcommittee to consider and favorably report H.R. 1646 in the near future.

Sincerely,

A handwritten signature in black ink, appearing to read "Melissa L. Sorenson", is written over a horizontal line.

Melissa L. Sorenson
Executive Director
National Association of Professional Background Screeners

[Questions submitted for the record and their responses follow:]

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 ADRIANO ESPALLAT, NEW YORK

June 21, 2017

Ms. Camille Olson
 Partner
 Seyfarth Shaw LLP
 233 South Wacker Drive, Suite 8000
 Chicago, IL 60606

Dear Ms. Olson:

Thank you again for testifying before the Subcommittee on Workforce Protections at the hearing entitled "The Need for More Responsible Regulatory and Enforcement Policies at the EEOC." I appreciate your participation.

Please find enclosed additional questions submitted by a Committee member following the hearing. Please provide written responses no later than July 5, 2017, for inclusion in the official hearing record. Responses should be sent to Jessica Goodman of the Committee staff, who can be contacted at (202) 225-7101.

We appreciate your continued contribution to the work of the Committee.

Sincerely,

Bradley Byrne
 Chairman
 Subcommittee on Workforce Protections

Enclosure

CC: The Honorable Mark Takano, Ranking Member, Subcommittee on Workforce Protections

Rep. Ferguson (GA)

1. Ms. Olson, in September 2016, the EEOC announced final changes to the EEO-1, which will require employers to annually report aggregate compensation data for all employees by gender, race, and ethnicity across pay bands. The new EEO-1 Report is significantly more complex: whereas the old EEO-1 report had 128 data points, it is my understanding that the new report consists of 3,660 data points. This report will have a clear impact on employers, and will add significantly to the reporting obligations already borne by employers.

While I appreciate the efforts of the EEOC to address pay discrimination, it does not seem clear to me that this new reporting requirement will substantially further the mission of the agency. Instead, it seems that the new reporting requirement will be costly and burdensome to businesses.

Did the EEOC accurately estimate the cost of complying with the revised EEO-1? If not, how was the EEOC's cost estimate flawed?

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 ADRIANO ESPAILLAT, NEW YORK

June 21, 2017

Ms. Lisa Ponder
 Vice President Global HR
 MWH Constructors, Inc.
 370 Interlocken Boulevard, Suite 300
 Broomfield, CO 80021

Dear Ms. Ponder:

Thank you again for testifying before the Subcommittee on Workforce Protections at the hearing entitled "The Need for More Responsible Regulatory and Enforcement Policies at the EEOC." I appreciate your participation.

Please find enclosed an additional question submitted by a Committee member following the hearing. Please provide a written response no later than July 5, 2017, for inclusion in the official hearing record. The response should be sent to Jessica Goodman of the Committee staff, who can be contacted at (202) 225-7101.

We appreciate your continued contribution to the work of the Committee.

Sincerely,

Bradley Byrne
 Chairman
 Subcommittee on Workforce Protections

Enclosure

CC: The Honorable Mark Takano, Ranking Member, Subcommittee on Workforce Protections

Rep. Rooney (FL)

1. Ms. Ponder, the current Employer Information Report (EEO-1) has 128 data cells, while the revised EEO-1 requiring the submission of employee pay data will have 3,660 data cells. The revised EEO-1 has also been estimated to cost employers \$1.3 billion annually and require more than 8 million man hours each year to complete. However, it has been suggested the EEO-1's new pay data reporting requirements are not overly burdensome because employers have been filing the EEO-1 without pay data for fifty years, employers already have their employees' W-2 gross income information, and employers already keep detailed compensation information. Please respond to this claim that the revised EEO-1 will not be overly burdensome.

[Ms. Olson's responses to questions submitted for the record follow:]

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SENIOR VICE PRESIDENT
LABOR, IMMIGRATION & EMPLOYER
BENEFITS

JAMES PLUNKETT
DIRECTOR
LABOR LAW POLICY

February 27, 2017

Via Email, John.M.Mulvaney@omb.eop.gov

John M. Mulvaney
Director
Office of Management and Budget
725 17th Street NW
Washington, D.C. 20503

RE: Request for Review; EEOC's Revision of the Employer Information Report

Dear Director Mulvaney:

On behalf of the U.S. Chamber of Commerce (Chamber), the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region, we are writing to request your review under Section 3517 of the Paperwork Reduction Act (PRA) and the PRA's implementing regulations (5 CFR 1320.10(f)) of the Equal Employment Opportunity Commission's (EEOC or Commission) revisions to the EEO-1 Form, as proposed at 81 Fed. Reg. 5113 (February 1, 2016) and 81 Fed. Reg. 45479 (July 14, 2016), and approved by OMB's Office of Information and Regulatory Affairs (OIRA) on October 18, 2016 (ICR number 201610-3046-001).¹

In short, the Chamber requests OMB to review and reject the EEOC's revisions to the EEO-1 Form because they do not comply with the PRA as detailed below and in the Chamber's prior submissions to both EEOC and OMB. The EEOC has not met its requirement to satisfy the burden, benefit, or confidentiality prerequisites of the PRA. For example, the EEOC has grossly understated the

¹ The U.S. Chamber of Commerce is also an employer which must file the revised EEO-1 Report.

burden based on conjecture, as opposed to data, at \$53.5 million per year. In contrast, the Chamber's 2016 survey of over 50 companies with 100 or more employees demonstrates that that cost of the EEOC's revised EEO-1 is in excess of \$400 million in pure labor costs alone, and carries a total burden of 1.3 billion per year for all businesses employing 100 or more employees. This is a huge additional cost for companies of all sizes, yet has no accompanying benefit, or protections for the confidentiality of the information to be gathered under the revised government form.

Although reporting of the new information does not begin for approximately one year, employers are already making the necessary investments in software upgrades, internal reporting processes, and staffing needs in order to comply. Therefore, as discussed in greater detail below, pursuant to Section 3517 of the PRA and 5 CFR 1320.10(f) and (g), the Chamber requests that OMB review and stay the effectiveness of, or rescind, the EEOC's revised EEO-1 as quickly as possible, as businesses are already incurring unnecessary expenses to compile 2017 data solely as a result of the requirements of the revised EEO-1.

I. Circumstances Leading to the EEO-1 Changes

Lawmakers on Capitol Hill and regulators in federal agencies such as the Department of Labor have long sought to force employers to report on their compensation practices.² These efforts have been largely unsuccessful because none have been shown to result in the production of data relevant to the current practices in the workplace and have been shown to place a tremendous and unnecessary burden on employers. As part of the most recent attempt during the Obama administration to collect employee salary information from employers, in 2014 the Office of Federal Contract Compliance Programs (OFCCP) issued a proposed regulation known as the compensation data collection tool.³ The comment period for OFCCP's proposal closed in early 2015 and the rulemaking process stalled – the proposal is currently listed as a “Long-Term Action” on the Fall 2016 regulatory agenda.

When OFCCP's effort failed – likely because the agency recognized its uselessness or otherwise knew its proposal could not pass muster under the

² For example, OFCCP's Equal Opportunity survey instrument, which began in 2000, similarly collected pay data from federal contractors. This survey was scrapped six years later due to ineffectiveness. Additionally, an often-forgotten component of the failed Paycheck Fairness Act would have resuscitated the fruitless EO survey.

³ 79 Fed. Reg. 46562 (August 8, 2014).

Administrative Procedure Act (“APA”) – the administration turned elsewhere to meet its quest for employee compensation data. This time, EEOC assumed the mission and proposed revising its existing EEO-1 form to include data on employee compensation and hours worked.⁴ In order to avoid the more complex obligations under the APA, the EEOC determined that the revisions to the EEO-1 would be examined under the PRA. Importantly, the PRA process does not provide the public with rulemaking protections as under the APA, such as a right to petition a federal court to review the agency’s action. The lack of judicial review under the PRA is a primary reason why OMB review of EEOC’s changes to its EEO-1 form is so vital.

II. EEOC’s Changes to the EEO-1 Reporting Form

The EEO-1 form requires employers and certain federal contractors to report on the demographics of their workforce. From time to time the form has been updated to reflect the changing demographics in our country. On February 1, 2016, the EEOC published a proposed revision to its EEO-1 reporting form. The changes would require every employer with 100 employees or more to submit not just demographic information, but also the W-2 wages and hours worked for all of their employees grouped in broad EEO-1 job categories, subdivided into twelve pay bands.

After a public hearing at EEOC as well as a public comment period, on July 14, 2016, the EEOC submitted its final proposal for revisions to the EEO-1 Form to OMB.⁵ Aside from changing the yearly reporting date to more closely align with the W-2 year and extending the initial reporting due date by six months, little substantive changes were made. After the PRA-required 30-day comment period at OMB, EEOC announced these changes as final on September 29, 2016, though the completed Notice of Action was not authorized by former OIRA Administrator Howard Shelanski until October 18, 2016. No EEO-1 filing will be required for 2017, but covered employers will have to file the new EEO-1 reports by the end of March 2018.

⁴ 81 Fed. Reg. 5113 (February 1, 2016).

⁵ Camille Olson, partner at Seyfarth Shaw and chair of the Chamber’s Equal Employment Opportunity Subcommittee, presented testimony on behalf of the Chamber at this hearing. Additionally, the Chamber submitted comprehensive and substantive comments to the EEOC on April 1, 2016 noting that the EEOC’s proposal failed to satisfy the PRA. The Chamber also presented critical comments to OMB on August 15, 2016.

III. The PRA Permits Rescission of Previously Approved Collections

Section 3517(b) of the PRA allows OMB to “review any collection of information conducted by or for an agency to determine, if . . . a person shall maintain, provide or disclose the information to or for the agency.” In turn, Section 3517(b)(2) permits OMB to “take appropriate remedial action, if necessary.” Further, in the regulations promulgated pursuant to the PRA, 5 CFR Part 1320, OMB is required to review its approval in the case of changed circumstances or when the burden estimates provided by the agency at the time of initial submission were materially in error. *See* 5 CFR 1320.10(f). If such circumstances are present, OMB may stay the effectiveness of its prior approval.

As demonstrated in further detail below, EEOC’s burden estimates for compliance with the revised EEO-1 report were materially in error and OMB therefore erred in approving EEOC’s revisions to its EEO-1 form. Given the broad remedial powers under Section 3517(b)(2) and 5 CFR 1320.10(g), the proper remedy in this situation is for OMB to either stay the effectiveness of its prior approval of the information collection, or otherwise rescind the OMB Control Number (3046-0007) until EEOC demonstrates that its proposal satisfies the burden, benefit, and confidentiality standards of the PRA.

IV. The EEOC Never Satisfied the Requirements of the PRA

When the federal government seeks to collect information from the public, the PRA requires the issuing agency to: (1) minimize the burden on those required to comply with government requests; (2) maximize the utility of the information being sought; and (3) ensure that the information provided is subject to appropriate confidentiality and privacy protections. EEOC failed to meet *all* of these standards throughout the entirety of the process that resulted in the changes to the EEO-1 form.

- **Burden.** EEOC failed to accurately or adequately address the burden being placed on filers by the revised EEO-1 report, thereby ignoring the PRA statutory requirement that it minimize the burden. Throughout the revision process, EEOC continually shifted its burden analysis and steadfastly refused to base its analysis on anything other than conjecture and speculation. In contrast, the Chamber performed an empirical survey of over 50 companies who file approximately 20,000 EEO-1 reports each year. The results are telling. As set forth in more detail in the attached Appendix A, EEOC speculated that it would require

1,892,980 hours per year at a cost **\$53.5 million** for 60,866 respondent companies to file an estimated 674,146 reports covering employment in their establishments using the “Components 1 and 2” expanded format EEO-1 form for the 2017 reporting year. The Chamber’s survey feedback estimated that in reality, employers would actually spend 8,056,045 hours complying with the reporting requirements at a cost of **\$400.8 million**.⁶

Along with other submissions during the comment period which showed that the EEOC’s burden estimates were absurdly low, the Chamber continues to receive information from members indicating that the EEOC materially underestimated the burden that the revised form would impose. Under these circumstances and pursuant to Section 3517(b) of the PRA and 5 CFR 1320.10(f) and (g), the OMB must either rescind its approval of the EEOC submission or stay the effectiveness of its approval until the EEOC acknowledges the actual burden and justifies its imposition pursuant to the requirements of law.

- **Benefit.** EEOC failed to identify any significant or tangible benefit the revised EEO-1 report would generate, thereby failing the requirement that it maximize the benefit to be derived from the report. Indeed, the EEOC did not demonstrate that its revisions to the EEO-1 form would be of any utility in helping the Commission carry out its statutory mission to combat discrimination. The new EEO-1 form categorizes employees in broad occupational groups that inevitably results in comparison of employees in very different jobs, performing very different tasks, with very different skills. This data will be of no utility to the EEOC because courts upholding federal employment laws do not permit the aggregation of dissimilar individuals into artificial job groupings in order to prove pay discrimination. EEOC itself even admitted that the information sought will not “establish pay discrimination as a legal matter.”⁷ Moreover, as the Chamber demonstrated in both its comments to the EEOC as well as its comments to OMB, the significant potential for statistical false positives and false negatives further undermines the utility of the data

⁶ This is the Chamber cost estimate based on direct labor cost only. Adding allowance for indirect overhead costs could result in an annual economic cost burden of \$1.3 billion. Furthermore, as reflected in Appendix A, EEOC’s burden estimate of the then-existing EEO-1 Form – referred to as Component 1 – was also materially in error.

⁷ 81 Fed. Reg. at 45489 (July 14, 2016).

and even prevents the data from being used as an early warning system, of sorts.

While OMB apparently chose to disregard these submissions in its prior review of the EEO-1 submission, the Chamber submits that the failure to show any tangible benefit with the new data collection requirement, let alone that the new requirement maximizes the benefit to be derived from the massive data collection to be compelled by the revised EEO-1, requires that the OMB rescind or stay its approval of the revised EEO-1 data collection. Further, upon a stay or rescission of the prior approval of the EEO-1 data request, the OMB should impose the stringent cost saving requirements required by the Executive Order issued by the President on January 30 regarding Reducing Regulation and Controlling Regulation Costs, to any resubmission by EEOC of its proposal to collect employee compensation data via the EEO-1 form.

- Confidentiality. EEOC ignored the significant privacy and confidentiality concerns raised in the review process and thereby failed to ensure that the privacy and confidentiality of the revised EEO-1 data would be protected. The EEOC is proposing to collect highly sensitive personal data regarding compensation at thousands of U.S. companies in a format which will not serve any of its statutory purposes but which will certainly be of great use to any hacker who is interested in the compensation practices of employers. In the hands of the wrong people, the original pay data from the EEO-1 report could cause significant harm to EEO-1 responders and subject employees to potential violation of their privacy. By letter dated September 23, 2016 we called to the attention of former Administrator Shelanski the GAO report of September 19, 2016 which criticized the government's response to cyber attacks, and noting that "[c]yber incidents affecting federal agencies have continued to grow, increasing about 1,300 percent from fiscal year 2006 to fiscal year 2015."⁸ Unfortunately, EEOC appears to be completely unaware of the enormity of this potential issue, and although it is statutorily required to do so, has failed to set forth appropriate steps or protocols to ensure the privacy and confidentiality of EEO-1 data.

⁸ GAO 16-885-T: "Federal Information Security: Actions Needed to Address Challenges" (September 19, 2016), available at <http://www.gao.gov/assets/680/679877.pdf>.

In addition, the EEOC has failed to address the problem that it disseminates information collected under the current EEO-1 to other federal agencies, state and local agencies and even private researchers without the protection required of this data by Section 709(d)(e) of Title VII. It has completely ignored the additional risk of disclosure of the significantly more sensitive information to be generated by the revised EEO-1 report. In the previous review process for the proposed EEO-1, the Chamber asked that OMB, at the very least, exercise its authority to impose the sanctions set forth in Section 709(e) of Title VII on every recipient of EEO-1 data. OMB did not respond to that request.

Despite EEOC's failure to satisfy the burden, benefit and confidentiality standards of the PRA, OMB nevertheless approved the information collection. We believe that OMB erred in this decision. Given the enormous costs associated with compliance – costs which the Chamber demonstrated through an empirical survey and which have been confirmed through recent member communications – it is imperative that OMB review the information collection and either issue a stay in the effectiveness of its prior approval or rescind its prior approval altogether; or undertake any other remedial action pursuant to Section 3517(b)(2) of the PRA, as appropriate.

V. Stay or Rescission of the EEO-1 Approval is Consistent with Current Regulatory Policy

In his Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs (January 30, 2017), President Trump noted that “it is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations.” As noted above, the Commission's new EEO-1 form will place an incredible economic burden on employers to produce information that will not advance EEOC's mission. Therefore, rescission of this extraordinarily expensive and useless requirement comports with the President's efforts to ease regulatory burdens on employers and the American public in general.

VI. Conclusion

We respectfully request that pursuant to Section 3517, you rescind OMB's prior approval of the EEOC's changes to its EEO-1 form, or alternatively, grant a stay of OMB's prior approval pursuant to 5 CFR 1320.10(g), until the Commission demonstrates that its revisions satisfy the PRA.

Thank you for your attention to this matter. Please contact us if you have any questions.

Sincerely,



Randel K. Johnson
Senior Vice President
Labor, Immigration & Employee Benefits



James Plunkett
Director
Labor Law Policy

Appendix A

Comparison of EEOC and U.S. Chamber Parameters and Calculations

Current EEO-1 Form Occupation, Gender & Race/Ethnicity Counts- "Component 1 only"

	EEOC	U.S. Chamber
1 Number of Respondent Firms	67,146	67,146
2 Number of Reports Filed	683,275	683,275
3 Reports per Firm (calculated 2/1)	10.2	10.2
4 Total Hours per Firm	15.7	66.8
5 Total Hours per Report	1.5	6.6
6 Total National Burden Hours	1,055,471	4,485,392
7 Cost per Burden Hour	\$28.48	\$49.75
8 Estimated Annual Cost	\$30,055,087	\$223,148,252

Proposed Expanded EEO-1 Form Occupation, Gender, Race/Ethnicity, Earnings, counts and Hours "Components 1 and 2"

	EEOC	U.S. Chamber
1 Number of Respondent Firms	60,866	60,866
2 Number of Reports Filed	674,146	674,146
3 Reports per Firm (calculated 2/1)	11.1	11.1
4 Total Hours per Firm	31.1	132.4
5 Total Hours per Report	2.8	12.0
6 Total National Burden Hours	1,892,980	8,056,045
7 Cost per Burden Hour	\$28.29	\$49.75
8 Estimated Annual Cost	\$53,546,359	\$400,788,224

May 2, 2017

Via Email, John.M.Mulvaney@omb.eop.gov

John M. Mulvaney
Director
Office of Management and Budget
725 17th Street NW
Washington, D.C. 20503

RE: DHL's Experience in Preparing a Submission Under the Revised EEO-1 Report

Dear Director Mulvaney,

On behalf of Deutsche Post DHL ("DHL"), I write to provide the Office of Management and Budget ("OMB") with information regarding our experience gathering the data that would be necessary to come into compliance with the pay and hours components of the new EEO-1 report. To put our reporting obligations in context, DHL conducts business in all 50 states and Washington D.C., employing approximately 10,000 employees in the United States across all entities. We have over forty establishments with more than 50 employees and over three hundred additional establishments with fewer than 50 employees spread over ten distinct legal entities which file for each of their establishments under DHL's EEO-1 company number.

As one of the world's largest and most innovative employers, DHL takes special pride in its employees. The Top Employer Institute has recognized DHL as a Top Employer in the United States for the past three years. DHL is committed to ensuring that all of its employees are treated and compensated equitably. However, based on our experience, the proposed revisions to the EEO-1 report will be exceedingly burdensome and will require us to divert our valuable and limited resources away from DHL's ongoing compliance initiatives to comply with a report that will result in information that is not useful for purposes of evaluating unlawful pay discrimination.

DHL's Estimates Far Exceed the EEOC's Burden Estimate

The EEOC has estimated that the burden of filing Components 1 and 2 of the revised EEO-1 report will be 31.1 hours per filer.¹ This estimate significantly understates the hours that DHL estimates for complying with the new EEO-1 report. Indeed, DHL estimates the total number of hours required for preparing Components 1 and 2 of the EEO-1 report on an annual basis will be at least 145 hours.

¹ This estimate is calculated by dividing the Total National Burden Hours (1,892,979.5) by the Number of Respondent Firms (60,866).

Our estimate is based on a “mock” data retrieval process which mirrored the process that we would utilize to prepare the revised EEO-1 report for all DHL entities. We performed this test using a subset of data for two DHL entities which consisted of 1,700 of our employees working in 29 locations. Based on this subset of data, we were able to extrapolate the amount of time we believe it will take for DHL to prepare the revised EEO-1 reports for our approximately 10,000 U.S. employee base, who collectively work in approximately 400 locations.

DHL’s EEO-1 Data Retrieval and Filing Process

DHL does not have an automated process for generating EEO-1 ready reports. Accordingly, the data gathering and review process is internally performed by our team of IT and HR professionals, with oversight by our legal department. After we have retrieved and processed the data internally, we then send the data to an outside vendor who performs the additional work required to synthesize, summarize and file the EEO-1 report.

DHL’s W-2, hours and EEO data are housed in decentralized systems most of which are maintained by each separate entity. Specifically, the data required to complete the revised EEO-1 report are currently housed by entity in two different information systems: one containing W-2 salary information and one containing hours information. DHL has a third system that contains additional information necessary for completing the EEO-1 report, such as the demographic and job title information.

The data fields maintained by each entity are not uniform when comparing one entity to the next. For instance, while the required information is available in each of the separate systems, the specific field locations, names, and codes often differ by entity. This means that the required data must be retrieved using separate data queries written specifically for that entity.

At DHL, the process of gathering and processing the data necessary to come into compliance with the new EEO-1 report can be segmented into multiple distinct steps.

1. DHL must first identify the specific data parameters that will be included in its reports. For instance, as described below, the EEOC requests only “hours worked” information which explicitly excludes hours tracked in DHL’s system such as vacation, leave, and holiday hours. Other hours may similarly need to be excluded.

DHL will need to go through each entity’s hours codes to determine which codes should be excluded in the queries. As demonstrated by the data provided in Appendix A, there are multiple codes that will need to be excluded. In other words, it is not as simple as looking for one specific code per excluded category. For instance, one of DHL’s entities has at least three holiday codes (designated holiday, floating holiday, floating holiday payout). This step will require a detailed, manual, and complex review involving multiple departments, including DHL’s legal department. DHL estimates that this step will take approximately 15 hours.

2. DHL will then write entity specific queries across the multiple databases to capture the raw hours and pay data. Recall that there are at least two systems for

each of DHL's ten entities. Given the EEOC's direction regarding the data that must be included in the analysis, the data queries are exceedingly complex and nuanced. And again, DHL would be required to prepare queries for each of its ten entities. DHL estimates that this step will take approximately 38 hours.

3. DHL will also need to prepare queries to capture the required demographic, job title and EEO-1 job category data from a third system. DHL estimates that this step will take approximately 8 hours.
4. After the raw data is generated, DHL must address critical formatting differences as part of a robust validation process in order to combine the data from the ten separate entities. For instance, DHL has to make the employee identifiers uniform to synthesize the raw data output across the three systems for each of the ten companies. This is but one example of the types of manual steps that must be completed.² DHL estimates that this step will take approximately 36 hours.
5. Finally, DHL will combine the multiple re-formatted datasets into a single report. DHL estimates that this step will take approximately 8 hours.
6. The combined report will then be sent to an outside vendor who will integrate the additional company and establishment information and format the data file according to the EEOC's specifications. Finally, the vendor will upload the EEO-1 reports. As part of this mock exercise, we have conferred with our vendor who estimates that it will require approximately 40 hours to complete Components 1 and 2 in light of the way DHL will provide the data to its vendor.

To further demonstrate the complexity of gathering the required data for the new EEO-1 report, we wish to focus on one specific area. That is the method for reporting the required hours data as compared to the way in which DHL tracks hours for its employees. Specifically, DHL tracks hours based on pay across all possible wage categories.

As part of our mock reports, the hours search query returned nearly 42,000 lines of data for just under 1,700 employees. We have reproduced a sampling of how the hours report would look for five employees to provide a representation of parts of the hours worked report. See Appendix A.³

The EEOC's FAQ and regulations provide that "hours worked" "includes all time an employee must be on duty, or on the employer's premises or at any other prescribed place of work, from the beginning of the first principal activity of the workday to the end of the last principal activity of the workday" and typically does not include vacation hours, paid sick leave or paid holidays. As you will note on Appendix A, many of the hours categories captured by DHL do not fall within the FLSA definition of "hours worked" that the EEOC wants employers

² Given the voluminous data necessary for submitting the analysis, we have concluded that the Excel program that most DHL users most readily know, will not be able to handle advanced formatting requirements. Accordingly, DHL is evaluating what other data systems are available for these purposes.

³ We have truncated the raw data produced in the search query to include only the columns relevant to hours. There are 51 columns in the raw hours worked report.

to capture. We have highlighted those hours that cannot be included in the EEO-1 report for ease of review. In other words, the EEOC is not interested in all of the hours associated with the W-2 wages. So employers like DHL will need to figure out how to remove certain reported hours that one would typically see in a standard year-end pay stub.

DHL has two options for modifying its data to comply with the EEOC's requirements: 1) find each and every pay category throughout each of the Company's 10 entities that should be excluded and prepare extensive data queries designed to eliminate those hours from the data, or 2) pull all hours data and separately back-out the excluded "hours" on the back-end. In either case, there is a significant and substantial expenditure of time and resources involved in gathering the hours data required by the EEOC.

We understand that the EEOC's burden estimate includes a one-time burden estimate of eight hours per filer for preparing queries necessary to obtain data from its HR systems. We do not agree that preparing such queries is a one-time burden. Nor do we agree with the eight hour burden estimate. The detailed data queries that DHL would be required to prepare as a result of the "hours worked" issue alone would have to be revisited each and every year. It is not uncommon for pay codes to routinely change within the DHL entities. In addition, each time our systems are updated -- which happens frequently -- the queries will need to be revised and evaluated for accuracy. This is not as simple as doing a "find and replace." Rather, each year, we will be conducting detailed reviews and revisions of our queries to ensure we are in compliance with the required reporting obligations.

Moreover, while there are additional substantive issues with the reliability of the data, the EEOC's methodology for requiring W-2 wages on the one hand and "hours worked" on the other hand, will yield data that is wildly improper for purposes of making *any* evaluations with regard to pay. To further demonstrate the issue, below is a representation of how the hours data for the five employees identified in Appendix A will significantly differ. Put differently, the reported hours will not coincide with the reported W-2 wages, even with respect to non-exempt employees.

Employee	Corresponding Hours	W-2 Wages*	FLSA Hours Worked**	Corresponding Wages	EEO-1 Reportable Hours	EEO-1 Reportable Wages
Employee 1	3101.07	\$104,814.77	2677.07	\$91,198.90	2677.07	\$104,814.77
Employee 2	2432.92	\$78,909.42	1904.92	\$60,731.10	1904.92	\$78,909.42
Employee 3	2635.17	\$86,645.22	2237.17	\$73,598.95	2237.17	\$86,645.22
Employee 4	3431.84	\$123,719.79	2921.09	\$106,361.00	2921.09	\$123,719.79
Employee 5	2712.43	\$90,781.77	2240.98	\$74,780.32	2240.98	\$90,781.77
*This represents hours which are attributable to wages reported on the employee W-2						
**This represents hours which may be included within the definition of "hours worked" contained in the FLSA						

Thus, the EEO-1 report will generate misleading information that does not accurately reflect the hours and wages of DHL's workforce.

Conclusion

DHL employs technically savvy professionals who are adept at writing queries and formatting data in order to help us internally monitor our compensation. However, even with our strong capabilities, our experience conducting this mock data exercise makes it clear that preparing the new EEO-1 report will be a significantly burdensome undertaking as described in the process above. Indeed, our burden estimate is more than 4.5 times greater than the 31.1 hours that the EEOC has estimated:

Step Performed By	Required Process	Estimated Hours for Completion
DHL	Identify data parameters for each separate entities reports	15
DHL	Write search queries and extract each separate entity's raw hours and pay data	38
DHL	Write search query and extract demographic, job title, and EEO-1 job category data	8
DHL	Validate and synthesize raw hours, pay, and EEO data	36
DHL	Combine synthesized hours, pay, and EEO data into single report	8
External Vendor	Integrate company and establishment information into combined hours, pay, and EEO data report	40
	Format combined report according to EEOC's data specifications	
	Upload combined report to EEO-1 system	
Total		145

We also believe that the EEOC's estimated hourly cost for completing the report grossly underestimates the financial burden associated with the revised EEO-1. While the EEOC estimates that the average cost per hour to complete Components 1 and 2 of the EEO-1 report will be \$28.29⁴, this exercise has demonstrated that the cost per hour will be substantially greater. And the information requested will lead to inaccurate and unusable data as demonstrated above.

⁴ This estimate is calculated by dividing the Estimated Annual Cost (\$53,546,359.08) by the Total National Burden Hours (1,892,979.5)

For these reasons we respectfully request that OMB reconsider its prior approval of the EEOC's changes to its EEO-1 form. We appreciate your consideration of the specific information DHL has provided with respect to our experience regarding the significant burden the EEO-1 report on employers.

Sincerely,

A handwritten signature in black ink, appearing to read 'B. Paskievitch', with a stylized flourish at the end.

Bradley S. Paskievitch

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July 5, 2017

VIA E-MAIL AND U.S. MAIL

Bradley Byrne
Chairman
Subcommittee on Workforce Protections
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, DC 20515-6100

c/o Jessica Goodman

Re: Response to Questions Regarding Revisions to the EEO-1 Report To Collect
Compensation and Hours Worked Data

Dear Chairman Byrne:

This Response provides answers to the questions in your letter dated June 21, 2017 following my testimony on behalf of the United States Chamber of Commerce at the hearing entitled "The Need for More Responsible Regulatory and Enforcement Policies at the EEOC." In the letter, Representative Drew Ferguson requested answers to two questions as set forth below:

Question #1: Did the EEOC accurately estimate the cost of complying with the revised EEO-1?

Response to Question 1:

No, the EEOC did not accurately estimate the costs of complying with the Revised EEO-1 report. The EEOC grossly underestimated the costs that employers across the country will be required to expend in order to comply with the burdensome new requirements for the reasons explained further below and in the attached materials.

WASHINGTON, D.C.
NEW YORK
SAN FRANCISCO
SACRAMENTO
SHANGHAI
SYDNEY
MELBOURNE
LOS ANGELES
LONDON
HOUSTON
CHICAGO
BOSTON
ATLANTA

Question #2: If not, how was the EEOC's cost estimate flawed?Response to Question 2:

From the outset, the EEOC's cost burden estimates have not been based on *any* empirical information, surveys, or other data that provide objective information regarding the time that will be required to collect, analyze and report the data necessary to satisfy the Revised EEO-1 reporting requirements. Instead, the EEOC's cost estimates are based on inaccurate assumptions not grounded in fact.

By way of example of the EEOC's guessing game with respect to its burden estimates, one need look no further than the EEOC's February 2016 proposed revisions as compared to the July 14, 2016 final proposal the EEOC submitted to the Office of Management and Budget ("OMB") (Compare 2/1/2016 Proposed Revisions, 81 Fed Reg 5113, Table 4 with July 14, 16 Proposed Revisions to OMB at pp. 45493 and 45496). Without explanation, the EEOC increased its annual burden estimate from \$10 million to approximately \$53 million per year (July 14, 2016 Proposed Revisions to OMB at pp. 45493 and 45496).

As explained below, the EEOC's revised \$53 million estimate remains significantly flawed. However, the massive swing in the EEOC's burden estimates highlights the fact that the EEOC is not basing its burden estimates on any objective, factual or verifiable information.

The evidence of the EEOC's unjustified burden estimates can be found in the actual survey data solicited by the U.S. Chamber of Commerce ("the Chamber") and completed by 50 employers who would be obligated to complete the Revised EEO-1 report. Because the EEOC provided *no* information concerning the basis for their burden estimates, the Chamber issued a survey to member organizations to gather information concerning the estimated costs under the then current and proposed Revised EEO-1 report. The Chamber collected data from over 50 employers who collectively file an estimated 20,000 EEO-1 reports each year (one per qualifying establishment within each company). The survey respondents represent a wide variety of industries and range in size from employers with 400 employees to more 200,000 employees. That objective survey data leads to the following significant conclusion:

- The EEOC has not minimized the burden on employers but has put forth an unreasonable burden calculation which is not based on any empirical data.
- **While the EEOC claims the Revised EEO-1 changes will cost approximately \$53 million in annual compliance costs, the U.S. Chambers' economic survey reveals this figure is actually over \$400 million -- more than seven times the EEOC's burden estimates.**

The objective data provided by the Chamber demonstrates the EEOC failed to meet its obligation to provide a meaningful burden analysis as required under the Paperwork Reduction Act. In addition to the Chamber's data, at least one employer, Deutsche Post DHL ("DHL") provided OMB with actual specific data concerning its experience gathering the information required to be

collected, analyzed and submitted to the EEOC with respect to the Revised EEO-1 report. For context, DHL employs approximately 10,000 employees across multiple entities in all 50 states.

DHL conducted a “mock” data retrieval process that was designed to mirror the process that would be utilized to prepare the revised EEO-1 report for all DHL entities. The mock test was based on using a subset of data for two DHL entities which consisted of 1,700 employees who work in 29 locations. Based on this subset of data, DHL extrapolated the amount of time it estimated it will take for DHL to prepare the Revised EEO-1 report. **Under the actual test, DHL estimated that it would cost at least 145 hours -- more than four times the EEOC’s burden estimate -- to comply with the new reporting requirements.**

DHL’s experience is not unique. The Chamber continues to gather information from employers across the country who continue to confirm that the EEOC’s burden estimates are significantly flawed. Without any objective data, survey information or a pilot study of any kind, the EEOC cannot meaningfully demonstrate that it has met its obligation to minimize the burden on employers, particularly when one considers the lack of utility of the Revised EEO-1 report, although the lack of utility is not specifically responsive to the questions presented here.¹

For the record, to address specifically the questions raised by the Committee, the Chamber attaches (1) its submission to the Office of Management and Budget dated August 15, 2016 as Exhibit 1, (2) the Chamber’s Request for Review dated February 27, 2017 as Exhibit 2, and (3) the letter DHL submitted to OMB as Exhibit 3, all of which provide further support and information regarding the EEOC’s flawed burden analysis.

In closing, the Chamber wishes to emphasize that its concerns with the Revised EEO-1 report does not reflect an indifference to pay inequities which are based upon unlawful factors. The Chamber is a long-standing supporter of reasonable and necessary steps to ensure equal pay for equal work and non-discriminatory compensation practices. Nonetheless, the Revised EEO-1 report is flawed in numerous respects, including specifically its understated burden estimate which will place enormous burdens on employers without any benefit. In short, the EEOC’s burden estimate is

¹ While the utility of the Revised EEO-1 Report is beyond the scope of the specific questions presented here, it is against the backdrop of the unsupported burden estimates that one should also consider that the EEOC concedes the information to be obtained under the Revised EEO-1 will not “establish pay discrimination as legal matter.” 81 Fed. Reg. at 45489 (July 14, 2016). Indeed, among other key deficiencies, the exceedingly broad employee groupings will result in comparisons of employees in very different jobs, who perform very different tasks and who possess very different skills sets. Thus, the data to be collected in the Revised EEO-1 will be of no utility because courts upholding federal employment laws do not permit the aggregation of dissimilar individuals into artificial job groupings in order to prove pay discrimination. Moreover, as the Chamber and its experts demonstrated in both its comments to the EEOC as well as its comments to OMB, the significant potential for statistical false positives and false negatives further undermines the utility of the data. Such findings can only lead to further data requests and the diversion of resources that would be necessary to defend against erroneous and misleading preliminary findings.

~~SEYFARTH~~
SHAW

Bradley Byrne
July 5, 2017
Page 4

not based on any data, is unreliable, and is contrary to actual data presented, and unaddressed by the EEOC. As a result, the EEOC has not met its obligations under the Paperwork Reduction Act.

Respectfully submitted on behalf of

THE UNITED STATES CHAMBER OF
COMMERCE



By: Camille A. Olson
Chair, U. S. Chamber of Commerce
Equal Employment Opportunity Subcommittee

cc: Mr. Randel K. Johnson

[Mr. Rooney's responses to questions submitted for the record follow:]



June 27, 2017

The Honorable Francis Rooney
Subcommittee on Workforce Protections
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, DC 20515-6100

Re: Question for the Record for the hearing entitled "The Need for More Responsible Regulatory and Enforcement Policies at the EEOC."

Dear Representative Rooney,

On behalf of the Society for Human Resource Management (SHRM), thank you for your question challenging the assertion that providing W-2 gross income information will not be overly burdensome for employers.

The Equal Employment Opportunity Commission's (EEOC) estimate for filing the revised EEO-1 Report is premised on the notion that "employers now rely extensively on automated human resource information system (HRIS) to generate the information they submit on the EEO-1 Report."¹

The EEOC's revised EEO-1 Report fails to recognize the true cost of generating W-2 wage and hours worked information by the EEO-1 job category and race/ethnicity and gender. While employers increasingly use HRIS to store EEO-1 job category and race/ethnicity/gender data, W-2 wage information is usually stored separately in an employer's payroll system. Actual hours worked information may be stored in yet a third timekeeping system. Gathering data from different systems is far more complicated than simply pulling additional data points from the same system.

Many large employers also utilize different HRIS, timekeeping, and/or payroll systems for different divisions, subsidiaries, acquired or merged companies, areas of the country, or type of worker, meaning that the number of systems that need to talk to each other may be far greater than just two or three. In addition, employers manually verify data points generated by computer systems before submitting to the EEOC. The Commission's burden estimate therefore significantly underestimates the difficulty and expense associated with collecting and verifying data points from multiple electronic systems. Moreover, the burden is compounded for SHRM members working for companies that do not currently have an HRIS at all. These employers will have to manually match the employees reported on their EEO-1 Report with their W-2 wage data and hours worked on an annual basis.

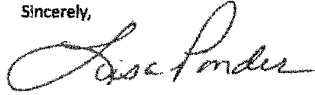
Finally, the EEOC's burden estimates minimizes the fact that most employers (indeed, over 97% of employers who filed an EEO-1 Report in 2015) manually enter data into each cell for each of their establishments using the EEOC's online portal. These employers are in fact still using "key strokes" to enter data into each relevant cell, albeit on an electronic rather than paper form. Again, the EEOC's burden estimate focuses primarily on

¹ 81 Federal Register at 5120.

the cost to file the EEO-1 Report, ignoring the amount of time it takes employers to collect, verify and validate the data before filing.

I appreciate the opportunity to provide additional clarifying information regarding the overly burdensome impact the revised EEO-1 Report will have on employers of all sizes.

Sincerely,

A handwritten signature in black ink, appearing to read "Lisa Ponder". The signature is fluid and cursive, with the first name "Lisa" and last name "Ponder" clearly distinguishable.

Lisa Ponder

[Whereupon, at 11:32 a.m., the subcommittee was adjourned.]

